No. 7695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM AND WILLIAM GREENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

Upon Appeal From The United States District Court For The District of Arizona

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STATEMENT OF THE CASE

Appellants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, appeal from a judgment of the District Court of the United States for the District of Arizona, finding them guilty and sentencing each of them to a term of imprisonment of four years under an indictment returned at the November, 1932, Term of the District Court, pursuant to which they, together with one A. E. Sanders and one H. D. Sanders, were charged with the use of the United States mails in furtherance of a scheme to defraud. (Section 338, Title 18, United States Code Annotated; Section 215 United States Penal Code.) The indictment was returned at the Tucson Division of the Court on

*Where figures only appear in parentheses, in this brief, they refer to pages in the printed Transcript of Record.

February 28, 1933 (107-108).* Inasmuch as the questions presented for review involve a consideration of the legal sufficiency of the indictment, the evidence introduced thereunder and the instructions of the court, each of these subjects, for purposes of convenience, will be treated under separate headings.

THE INDICTMENT

The indictment, charging a use of the United States mails in furtherance of a scheme to defraud in violation of Section 338, Title 18, United States Code Annotated, was returned and presented in seventeen counts, each count charging the offense against five defendants, including in addition to appellants, A. E. Sanders and H. D. Sanders, his brother, the latter two being the first named in the indictment.

The separate demurrers of appellants were sustained as to counts two to seventeen, inclusive, leaving the first count only upon which the defendants were tried. This first count, in a series of patchwork allegations, attempts to charge the offense substantially as follows:

Prior to the **dates* on which the letters were mailed "as hereinafter alleged *in the several counts* of this indictment," the five named defendants "did devise, and intended to devise," a scheme and artifice to defraud, *and* to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth, from certain named individuals, including one Addie Driscoll, the letter to whom, included in the first count of the indictment, constituted the only alleged misuse of the mails (13). Letters to the other individuals named in the first

*Emphasis ours except as otherwise noted.

paragraph of the first count of the indictment were the subject matter of the subsequent counts to which the demurrers had been successfully interposed. It is charged that the scheme and artifice continued in effect to and including the nineteenth day of March, 1931 (3).

After the first paragraph specifying the offense, the first count proceeds to set forth the "scheme and artifice" sought to be alleged in several parts, each part constituting what the pleader denominates "a part" or "a further part" of said scheme and artifice (3-7).

It is recited that the defendants should and did organize under the laws of Arizona, a corporation known as Clarence Saunders Stores, Inc., with a capitalization of 300,000 shares of common stock of no par value, and 15,000 shares of preferred stock of the par value of $100.00 each, for the purpose of engaging in the chain grocery store business, using the name Clarence Saunders Stores, Inc. (3); that the name of the corporation was changed successively to Arizona Clarence Saunders Stores, Inc., United Clarence Saunders Stores, Inc., and United Sanders Stores, Inc., and that the corporation was dominated at all times by the defendants; (4) that the defendant, A. E. Sanders, transferred to the corporation a franchise agreement between himself and the "Clarence Saunders Corporation," the agreement providing that A. E. Sanders should pay one-half of one per cent of the gross sales of all stores so operated by him, for the use of the trade name "Clarence Saunders," which franchise was transferred to the corporation together with an option to purchase certain stores known as the "Cashway Stores" in the City of Tucson, in consideration of the issuance to A. E. Sanders of 151,000

shares of the common stock; (4) that the sum of $151,000.00 for said franchise was set up in the books but that it had little or no value whatsoever (4).

It is further alleged that the defendants should and they did issue to the defendant, A. E. Sanders, for the sum of $1.00, 35,000 shares of the common stock, and that the defendants sold to the persons to be defrauded more than three-fifths of these shares for their own benefit; (5) that the defendants under the name "Greenbaum Brothers" and "Bond and Mortgage Corporation," did offer and sell to the persons to be defrauded, the common and preferred stock and debenture bonds of the corporation by means of false and fraudulent statements as to the financial condition of the corporation; (5) that the defendants authorized and paid, on June 29, 1929, a semi-annual, eight per cent dividend, on preferred stock, to holders of record as of April 30, 1939 (1929), when defendants knew that the corporation had been operating at a loss (5).

Then, abandoning the habitual form of allegation directed against the intent and activity of all the defendants, the indictment alleges that it was a part of the scheme that the individual defendant, H. D. Sanders, *and his associates*, without naming who the associates were, should and did, on May 15, 1929, incorporate an Arizona company under the name Piggly Wiggly Holding Corporation, the name of which was subsequently changed on February 24, 1930, to "U-Save Holding Corporation," which company was thereafter engaged in business in Los Angeles, California (6).

It is alleged to be a further part of said scheme and artifice that the said U-Save Holding Corporation should, and did acquire the majority of the common

capital stock of United Sanders Stores, Inc. (the last name assumed by the corporation in question) and then proceeded to take charge of the assets and to remove merchandise valued at more than $100,000.00 from the warehouses of the company at Phoenix, Tucson and Nogales, Arizona, and to ship the same to Los Angeles, California, without rendering just and proper compensation therefor.

The indictment charges, furthermore, that the defendants authorized and paid, in the form of a dividend, interest at the rate of eight per cent per annum, to holders of preferred capital stock of record as of December 31, 1929, with interest at said rate on all money that had been paid to the corporation on subscriptions for said preferred stock, whereas the defendants knew that the corporation had at all times been operated at a financial loss; that there was a surplus deficit of more than $144,000.00, and that said payments of dividends or interest were not made from earnings or surplus but from the capital of the company (7).

Then follows the allegation that it was further a part of said scheme, and in furtherance thereof, that the defendants, to induce persons to be defrauded, to part with money and property in the purchase of common and preferred stock and debenture bonds of the corporation, would and did unlawfully and fraudulently, make false pretenses and promises to the persons to be defrauded through and by means of conversations, letters, circulars, financial statements, newspapers and advertisements. A series of fourteen numbered paragraphs ensues, attempting to set up specific instances of alleged misrepresentation. As to each alleged false pretense it is charged that the same was untrue and that the falsity thereof was known

to the defendants. They are substantially as follows (8-12):

(1) To the effect that the business of the corporation involved was being conducted under the "guiding hand" of Clarence Saunders.

(2) To the effect that the business of the corporation was being effectively handled and substantial profits being made.

(3) That "We earnestly believe that as time goes by you will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made."

(4) That, "Our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company which has really exceeded our expectations."

(5) That "Your Arizona Clarence Saunders Stock is not a gambling proposition. It is an investment. Through your preferred stock you are receiving 8% a year on your investment from the proceeds of all the stores and warehouses***; that your common stock will eventually surprise you by the large annual income per share you will receive from it over a long period of years."

(6) To the effect that during the ten months ending November 26, 1929, the stores then in operation had made splendid profits.

(7) That, "While this development is going on, residents of Arizona have an opportunity to become part owners of these stores and share in their splendid profits."

(8) That, "We want you to know and feel that you are a part of this company and to know that the business is being conducted on the very highest planes and to the interests of its customers and stockholders at all times."

(9) That, "We expect to open a minimum of ten new stores during the current year of 1931, without any increase in our outstanding capital. The company is in a good financial position, as will be shown by financial statement as of December 31, 1930."

(10) That, "Exchanging your investment from United Sanders Stores, Inc., to U-Save Holding Corporation, gives you a better investment than you had before, even at the time you made your original purchase. The book value of our Class A stock which we are offering in exchange for your United Sanders Stores, Inc., stock is $18.60 per share. This value should increase steadily as we expand through franchising our system and we believe that it is only a question of a few years until its selling value will be ten times what its book value is today."

(11) To the effect that stock offered for sale had no connection with the name "Sanders", but that it was strictly stock of the Clarence Saunders Co., the originator of the Piggly Wiggly Stores.

(12) To the effect that the Arizona Clarence Saunders Stores, Inc., would guarantee interest on its stock after six months, no matter what happened.

(13) To the effect that the Arizona Clarence Saunders Stores, Inc., was making large profits; that the common stock would be worth $25.00 per share within ninety days and that the company had no indebtedness.

(14) To the effect that the common stock of said corporation would soon go on the market at $10.00 per share and upwards and a $300.00 bonus would be paid on a $1000.00 debenture bond at the end of three years.

After these fourteen specifications of misrepresentation, the indictment concludes that said defendants, referring to the five originally named, on the 9th day of April, 1930, at Phoenix, Arizona, having devised the scheme and artifice set forth in the first, unnumbered paragraphs of the count, and with the intent upon their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place, and cause to be placed in the Post Office establishment to the person to whom the same was directed, a letter, enclosed in an envelope, bearing United States postage in the sum of two cents, and the following return card, direction and address, to-wit: a letter addressed to one Addie Driscoll, Box 103, Douglas, Arizona, the said Addie Driscoll being one of the persons to be defrauded, as said defendants well knew, and which letter is as follows:

"Bond and Mortgage Corporation
Security Building,
Phoenix, Arizona.
April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.

Dear Madam:

"Answering your letter of April 8th, we wish to advise that the Common Stock of the United Clarence Saunders Stores, Inc. is being offered to the public through this company for $10.00 per share.

"Trusting that this is the information you desire, we are,

Yours very truly,

BOND AND MORTGAGE CORPORATION

By: (Signed) M. LOVELAND
Assistant Secretary." (13)

The foregoing first count of the indictment under which the defendants were tried was not only attacked by the separate demurrers of appellants (111-128), but its sufficiency was, as well, successively called to the attention of the Trial Judge upon formal objection made to the introduction of any evidence thereunder at the opening of the trial; (208) upon the motion for directed verdict at the close of the Government's case; (449) upon the motion for new trial, and finally, upon the motion in arrest of judgment (185, 188, 481, 482). Each of these successive attacks upon the first count of the indictment was predicated upon the same grounds, the most important of which, for the purpose of brevity and avoiding repetition, are enumerated as follows:

(1) That no crime is charged and no facts set forth constituting an offense against the laws of the United States of America;

(2) That the indictment is vague, indefinite, uncertain and incomplete and does not set forth any certain scheme or device with sufficient accuracy to inform the defendants of the offense charged against them;

(3) That the indictment is bad, in that it is guilty of duplicity, having in a single count more than one separate and distinct offense.

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Under the indictment as outlined above, A. E. Sanders and appellants were arraigned and pleaded "not guilty." H. D. Sanders, residing in El Paso, Texas, charged with serious complicity in the alleged offense, was never apprehended, and A. E. Sanders, the head of the enterprise, the affairs of which were the subject of inquiry in the proceedings below, who was separately represented by his counsel, Mr. Duane Bird, withdrew his plea of "not guilty" in the midst of the trial, pleaded "*nolo contendere*," testified as a Government witness and was awarded a suspension of sentence on parole. Appellants entered, and persisted in, their pleas of "not guilty."

THE FACTS

So involved and disjointed is the evidence of the Government by reason of the failure to proceed in a logical or chronological order, the calling and recalling and interruptions of the witnesses, that it is necessary, for the purpose of aiding the court and lightening its burden in arriving at a prompt and adequate comprehension of the facts, that a complete, if, perhaps, somewhat lengthy statement of the facts be made.

At the outset it should be noted that appellants contended below that the record made by the Government discloses, in many important particulars, an utter failure of proof, in others a wide variance between the indictment and the evidence and in others, still, the gravest of errors in the admission of dangerously prejudicial and incompetent evidence, and that, therefore, the proof, if it disclosed anything, demonstrated that they were not guilty of the offense charged. They determined, therefore, at the conclusion of the Government's case, to rest and thereupon renewed their motion for a directed verdict. All of the facts under

discussion, accordingly are based upon the Government's exhibits and upon the examination and cross-examination of its witnesses.

On October 25, 1928, the Clarence Saunders Stores, Inc., was incorporated as an Arizona corporation by the filing with the Corporation Commission of its articles of incorporation (209). The name of this company was subsequently changed, as charged in the indictment, but, for purposes of brevity and convenience, the corporation will be hereinafter referred to, unless special occasion requires the designation of its name at any particular time, as "the corporation" or "the company." The original authorized capital included 15,000 shares of eight per cent preferred stock of the par value of $100.00 each, and 300,000 shares of common stock of no par value (209). Subsequently, by amendment to the articles of incorporation, the capitalization was changed to 50,000 shares of eight per cent preferred stock, of the par value of $100.00 each, and 500,000 shares of common stock, of no par value (211). The activities of the defendants respecting this corporation constitute the basis of the alleged scheme to defraud, or, as sometimes called, "the genesis" of the offense.

The corporation was organized by the defendant, A. E. Sanders, and his associate or employee, E. B. Horne, through Mr. Sander's counsel, Mr. Duane Bird (209, 346). Appellants had nothing to do with the organization of the company (349). A. E. Sanders, testifying that Mr. Bird was representing him and not them, and that the company was organized by him (346).

Prior to the incorporation of the company, the defendant, A. E. Sanders, procured a franchise or right

to use the name "Clarence Saunders" in connection with a chain store grocery business in Arizona, which franchise was subsequently transferred to the corporation when organized. Sanders, having been sworn as a Government witness, testified that in the latter part of 1928, before the corporation was organized, he had a conference with Will Greenbaum, one of the appellants, in which the latter asked if Sanders thought he could get a concession from Clarence Saunders, after which Sanders, pursuant to arrangement made by telephone or telegraph, went to Memphis, Tennessee. Sanders said that the matter was discussed several times with appellants, but the time and place of these conversations and what was said by the parties participating therein was not disclosed, the trial court permitting, over objection, testimony of the general purport or result of conversations without requiring this or other witnesses to give the substance of what was said by the parties to any such conversation. Sanders asserted, in his direct examination, *that he and appellant, Will Greenbaum, went to Memphis, and that the said Greenbaum and he had an interview with Mr. Saunders in Memphis* and that he, Sanders, secured a franchise for Arizona and New Mexico outside of two counties, issuing to Sanders what was repeatedly referred to as a "franchise for the use of the Saunders name," after which they returned to Arizona and organized the corporation (345).

On cross-examination, the witness stated that *he did not know whether or not appellant, Will Greenbaum, made the trip as the result of which the franchise was procured,* the witness stating that as to any trip made to Memphis by Will Greenbaum, "it might have been later, I don't know that we visited Saunders

there" (352). Thereupon, the court interrupted and asked:

> "Didn't you testify a moment ago you and Mr. Greenbaum went to see Mr. Saunders before the incorporation of the company?"

And the witness replied that as to any trip which Will Greenbaum made with him, it might have been two or three months after the incorporation of the company (353).

Having procured the franchise to use the Saunders name, A. E. Sanders himself proceeded, as has been said, to organize the Arizona corporation. Parenthetically, it is of interest to note that the defendant, A. E. Sanders, prior to the organization of the company under consideration, and prior to his acquaintance with appellants, had procured the right to use the name "Piggly Wiggly" and had organized the Piggly Wiggly Southwestern Company (344) and that after the creation of the company in question, in October of 1930, without assistance or co-operation of appellants, he organized and was financing another chain of grocery stores in the State of Kansas (247).

The defendant, Sanders, and the said Horne, through Sander's counsel, Mr. Duane Bird, then obtained permission from the Arizona Corporation Commission, on behalf of the corporation, to issue and sell 1500 shares of its preferred stock, at $100.00 a share, and 50,000 shares of its common stock of no par value, at $1.00 a share, and obtained an order, also, that the corporation might pay a commission of not to exceed 20% on the sale of the stock. The application for the permit, and the permit, being Government's Exhibit 14 (221, 222), shows that an order of the Corporation Commission was also then obtained authorizing the company to issue 151,000 shares of its com-

mon stock to the defendant, A. E. Sanders, in consideration of the transfer by him to the corporation of his license and franchise to operate "Clarence Saunders Sole Owner Of My Name" food stores in Arizona and New Mexico, and of the transfer to the company of Sander's option or agreement to purchase the stores of the "Cashway Markets" in Tucson. Attached to the application for this first permit is a copy of the agreement between the defendant, Sanders, and the Clarence Saunders Corporation, granting to Sanders the right to use the Saunders name.

In the indictment, as well as throughout the trial, this license agreement is referred to as a mere concession to use the name "Clarence Saunders" and as a contract of little or no value (5) and the terms of the instrument and the rights accorded to the company by permission to operate thereunder were ignored and asserted as worthless. L. D. Null, an accountant (not certified), testified that the Saunders license agreement was of no value whatsoever (380). Null, however, said, on cross-examination: "As to the value of the franchise, I am afraid I could not answer, as I have already said, it had no value and I will have to stick to that" (385). Again he said (389): "I have never owned a grocery store or any other kind of a store **** Matters of that kind cannot be computed, but I still say the Clarence Saunders franchise was worth nothing, that is my opinion."

The license agreement provides that the licensee shall purchase from the licensor and install standard store equipment in detail under each store operated thereunder; to place a large sign as directed by the licensor on which shall appear the trade-name "CLARENCE SAUNDERS Sole Owner Of My Name." The licensee agrees to use no other name or sign in con-

junction with said trade-name and contracted to form no agreement directly or indirectly with any competitive business. After providing for weekly reports to the licensor of sales and any other phase of the business as the licensor might require, the licensee agrees to permit the licensor to inspect store premises, to pay the licensor promptly for merchandise or store equipment purchased, to establish stores under a given schedule and, finally, to pay the licensee a monthly license fee of one-half of one per cent on the gross sales of each store operated under the agreement.

The licensor agrees, upon its part, to furnish to the licensee plans and specifications for each store building, instructions as to all changes and remodeling required, designs for color scheme and trade-name, floor plans for installation of fixtures and merchandise, standard advertising copy for opening announcements and other advertising, information as a guide for the purchasing of merchandise, instructions for uniform methods of accounting and keeping of records, and most important of all, to cooperate with the licensee in increasing and maintaining sales and profits for the benefit of the licensee as well as of the licensor and all other groups or chains of stores operated under a Saunders license (227-228). There is no evidence that appellants had any connection whatsoever with the obtaining of the permit to sell the stock, with the valuation of the Saunders license agreement or of the Cashway option, fixed by the Corporation Commission at $151,000.00, or with the issuance to Sanders of 151,000 shares of no par value stock, nor is there any evidence of any kind indicating that appellants had any knowledge that the Saunders license agreement was not being performed or observed by the parties.

When the Corporation Commission of Arizona permitted the license and option agreements to be capitalized at $151,000.00, after a full disclosure of the documents, and authorized in consideration therefor, the delivery of 151,000 shares of the common stock to A. E. Sanders, the shares of stock so transferred were not required, by order of the Corporation Commission, to be placed or held in escrow (241).

Thereafter, the defendant, Sanders, by his same attorney, Mr. Duane Bird, applied for a further permit to sell shares of the company, and the permit was accordingly issued on March 22, 1929, granting permission to sell 10,000 shares of preferred stock at $100.00 a share, and 80,000 shares of no par value common at $5.00 a share (Government's Exhibit 15) (228). In Mr. Bird's application he states that the stock authorized to be sold by the preceding permit had been over subscribed, that the Tucson program had been financed and launched and that the company desired to finance the installation of fifteen stores and a warehouse in Phoenix, locations for which were being secured. A financial statement is found attached to this application showing an already existing surplus in the sum of $2389.00 (230). As to this application, also, there is no evidence of connection on the part of appellants. They did, pursuant to agreement with the corporation and with the defendant, Sanders, sell the stock and receive from time to time the commission authorized to be paid under permits issued by the Corporation Commission of Arizona.

Again, on behalf of defendant, Sanders, Mr. Bird applied for a permit to issue and sell 11,000 shares of the preferred stock of the company at $100.00 a share, and 70,000 shares of its no par common stock at $7.50 a share, upon a commission of twenty per cent. (Gov-

ernment's Exhibit 16) (231). The progress made by the corporation is disclosed by Mr. Bird's application wherein he states that "the company now has in operation six stores and a warehouse at Tucson, Arizona, and three stores and a warehouse at Phoenix, Arizona. In addition thereto another store will be opened in Tucson during this month, seven Phoenix locations are under lease and buildings are in the course of construction and should be completed within sixty days, and one location in Mesa has been secured and the store building is now being completed **** Barring unforeseen circumstances, nine additional stores will be opened by the corporation by September 1, 1929. The company will continue to open stores as rapidly as possible until its entire territory is covered" (232, 233).

A subsequent application was made and a permit issued, dated March 10, 1930, to sell 10,000 shares of common stock at $10.00 a share and to issue and sell $250,000.00 of debentures (Government's Exhibit 17) (233, 235).

On July 15, 1930, another permit was granted to issue and sell 1000 shares of no par value common, at $10.00 a share, and $20,000.00 of its debentures upon the same commission of twenty per cent (Government's Exhibit 18) (235). To the application for permit of March 10, 1930 (Government's Exhibit 17), was attached a financial statement prepared by the Government's witness, Tom H. Brandt, the Comptroller of the company. This statement, Mr. Brandt testified, was correct (332), and was not only attached to the application for the permit but was sent to trade creditors for the purpose of establishing and fortifying the credit of the company (335). The company

is now found to have grown to possess balancing assets and liabilities totaling $1,011,577.44, with cash on hand as of December 31, 1929, in the sum of $51,-326.72. Inasmuch as a further analysis of this financial statement will be necessary in the ensuing recital of the facts, it will not further be discussed at this point. Suffice here to say that this Government witness, Mr. Tom H. Brandt, testified, on cross-examination, that:

> "Mr. Gus Greenbaum had nothing whatsoever to do with the preparation of this statement *** He had nothing whatsoever to do with the entries on the books of the stores company. After the financial statement of December 31, 1929, was prepared it was handed to Mr. Gus Greenbaum as a true and correct statement of the financial condition of the company. Mr. William Greenbaum or Mr. Charles Greenbaum had nothing whatsoever to do with the preparation of that statement; nor did they have anything whatsoever to do with the books and records of the stores company, nor with the entries in such books and records." (334.)

Attached to the last application for a permit to sell the securities of the company (Government's Exhibit 18), is another financial statement showing the condition of the company on May 31, 1930, a statement, it is important to observe, prepared probably by one of the officers of the company, Mr. G. C. Partee, the secretary. The company is now found to have grown to $1,125,101.14, the assets including almost $24,-000.00 of cash, accounts receivable in the sum of over $135,000.00, merchandise and supplies in the amount of over $345,000.00, investments over $108,000.00, fixtures and equipment in the sum of more than

$163,000.00 and automotive equipment over $10,-000.00 (236). These witnesses against appellants are accordingly found to have sponsored a financial statement showing a total net worth on May 31, 1930, of $966,413.88 (238).

In this connection, it should be noted, another financial statement was prepared on behalf of the company by Government witness, G. C. Partee, and approved by Government witness, Tom H. Brands, showing the financial condition of the corporation as of a date one month following the statement of May 31, 1930. The evidence for the Government discloses a special meeting of the board of directors at which the financial statement of the company as of June 30, 1930, was presented by the President (A. E. Sanders). The minutes show that it was prepared by G. C. Partee and approved by Tom H. Brandt. It was confirmed by the board of directors and ordered spread upon the minute book (Government's Exhibit 22) (248). According to this financial statement, which was certified by a Certified Public Accountant employed by the corporation, the company *is found to have a surplus of $185,392.60* (249, 250). As has been seen, it was affirmatively shown that appellants had no hand in the preparation of any of the financial statements of the company and no knowledge or control of its books and records, the entries in which, presumably, furnished the basis for the statements.

When the corporation was organized and the first permit to sell the shares of the company obtained, appellants were given the contract to handle all of the stock of the company for a twenty per cent commission (346).

Appellants first operated under the name Greenbaum Brothers and, subsequently, having organized

the Bond and Mortgage Corporation, an Arizona corporation, (214) the sale of the securities was carried on by that company in which appellants solely were interested.

As the result of appellants' efforts in the sale of the stock, and to a small extent, of the debentures of the company, the company received in cash $80.00 out of every $100.00 of the stock of the corporation sold by them to a total amount of upwards of $900,000.00. (Sometimes testified to be over $800,000.00 (349).

A. E. Sanders, having received, pursuant to the order and consent of the Corporation Commission, 151,000 shares of the common stock of the company, which were not required to be placed in escrow and no other restriction imposed, contracted to deliver to appellants a certain number of shares upon fulfillment by them of an agreed schedule of performance in the sale of the company's unissued stock (405). Sanders placed this amount, in round numbers, at 20,000 shares, but the record is not clear cut and complete upon this subject. They did not receive any of this personally owned stock until May 2, 1929, over five months after incorporation, when they received a certificate for 3850 shares. Thereafter certificates were issued and transfers made to them or to their designates, from time to time, out of the Sanders block, which appellants sold for their individual benefit. Neither of the Sanders defendants participated in the result of these sales.

There is no supporting allegation in the indictment for this evidence, that document alleging that the defendants—meaning all of them—caused 35,000 shares of common stock to be issued to A. E. Sanders in con-

sideration of the sum of $1.00, and sold more than three-fifths thereof for the benefit of all the defendants (5). As to this alleged transaction the Government's evidence disclosed that while Sanders did cause 35,000 shares of common stock to be issued to himself for services, an event in which appellants did not participate, the certificate was subsequently cancelled and the transaction nullified. There is no allegation in the indictment that appellants received excessive or concealed commissions, nor is there any allegation of a violation or evasion of the Arizona Securities Law, Sanders' stock, as has been said, being free from any escrow restrictions.

When the company was launched and the permit to sell its stock issued, appellants proceeded to offer and sell shares to the public. A. E. Sanders, in his management and control of the corporation, dealt with appellants, as the sellers of the stock, at arms length, contracting to pay a commission, receiving the proceeds of the sales and recording the transactions in the company's separate books and records (332). Appellants, both when they operated as Greenbaum Brothers and as the corporation known as the Bond and Mortgage Corporation maintained a separate office, conducted their operations separately, kept their own books and records, employed and paid their own employees and all other expenses of their individual operations (331).

A. E. Sanders, with his own employees and associates, conducted the actual operation of the merchandising business. Sanders, testifying as a Government witness said:

> "The Bond and Mortgage Corporation was not connected with our company at that time.

> * * * The name of the first corporation I testified about was 'Clarence Saunders Stores, Inc.; that company was incorporated by me through my attorney, Duane Bird. None of the Greenbaums were incorporators of that company, nor were any of them an officer or director of that company * * * * It was not in any way managed by the Greenbaums" (348).

Brandt, also, testified:

> "I knew that the affairs and management of the company was controlled by the board of directors or by Mr. Sanders as President * * * * Their (appellants) books were not kept in the warehouse, as the Bond and Mortgage Company was separate and apart from the stores company. The Bond and Mortgage Corporation had no direction or control over what entries should be made in the books of the stores company as that was exclusively under my control and direction" (331, 332).

In connection with the offer and sale of the stocks and debentures, the record discloses that certain representations were made. The indictment, it must be borne in mind, charges that the scheme and artifice alleged as having been concocted by all of the defendants, pursuant to which the letter alleged as constituting the offense under the statute was mailed, was a scheme and artifice "to defraud *and* to obtain money by means of false and fraudulent representations, pretenses and promises," the evidence in this connection falling, naturally, into two distinct channels: (1) Evidence of the representations made and (2) evidence of the falsity thereof.

Both oral and written misrepresentations were

charged as having been made. Numerous letters were written and sent through the United States mails, as to many of which appellants were the undoubted sponsors, but as to others it affirmatively appears that appellants had no connection with them whatsoever. Within a reasonable space it is impossible to quote fully from the letters and notices which went to the public and the stockholders. Typical examples of the statements made therein, however, are herewith given. Some of these letters are signed by a rubber stamp, facsimile signature, the stamp for which was, at times, openly and without any attempt at concealment, kept in appellants' office. As to such letters, however, there is no evidence that they were sent without Sanders' full knowledge and approval or that they were not sent after his actual dictation.

One of the first letters written was signed by appellant, G. B. Greenbaum, as Financial Manager of the Clarence Saunders Stores Corporation, dated January 12, 1929. After acknowledging receipt of the subscription the letter goes on to say: "You can rest assured that the company's business will always be maintained on the highest possible business methods." (Government's Exhibit 77) (319). In another letter (Government's Exhibit 45) (275) the statement appears: "You will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made," and "with Clarence Saunders guiding hand over the different stores to be established under his name we can only say one thing and that is, within a few years you will find Arizona Clarence Saunders Stores the outstanding food distribution stores in the world." This letter was signed by the defendant, A. E. Sanders personally. In another letter

(Government's Exhibit 48) (276) the stockholders are told not to trade their stock "for nebulous issues of uncertain values" and cautioned not to buy stock on margin, stating that "through your preferred stock you are receiving eight per cent a year on your investment from the proceeds of the stores and warehouses," and "I believe that your common stock will eventually surprise you by the large annual income per share you will receive from it over a long period of years," and "your stores are handling an enormous business."

Again, in a letter to the stockholders (Government's Exhibit 49) (277), signed with the facsimile signature of A. E. Sanders, it is stated that the retail business has reached large proportions; that the Bond and Mortgage Corporation will hereafter handle the stock issues and recommends the purchase of additional stock from the Bond and Mortgage Corporation.

In a letter dated April 3, 1930 (Government's Exhibit 50) (278), it is said that Henry Ford advocates chain stores, that the volume of business at present has been very satisfactory and "We expect that this year will run into several millions of dollars." In another form letter of July 1, 1930 (Government's Exhibit 51) (278), it was said "that the volume of business of the stores company has increased steadily and that the stockholders personal interest in the company has been the moving factor for the splendid showing that has been made." A letter from the Bond and Mortgage Corporation, dated August 11, 1930 (Government's Exhibit 62) (295) acknowledges receipt of a subscription, congratulates the buyer and states "We believe it will prove to be more and more profitable as the years pass and the great chain of

self-service grocery stores continues to grow throughout the southwest."

Government's Exhibit 63 (296), being a letter of the Bond and Mortgage Corporation addressed to a stockholder enclosing a certificate for stock purchased, states, among other things, that "The stores were created by a genius in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly Wiggly Stores * * * * and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery."

A form letter to stockholders, dated August 29, 1929, relates that the various stores are rapidly nearing completion; that some stores have opened; that more than 1100 people had purchased securities of the company, that each one was a satisfied purchaser and that "our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company which has really exceeded our expectation." (Government's Exhibit 83) (339).

Another form letter to stockholders, dated September 16, 1929, containing the mimeographed signature of A. E. Sanders, advises the stockholders that he, Sanders, attended the opening of Clarence Saunders Stores in Los Angeles, and states that the stockholders would be naturally interested to know the progress that other Saunders Stores are making not only in Arizona but in other sections of the United States; that the opening of the Los Angeles stores was the greatest ever held in the whole world, over 110,000 people actually making purchases and over 300,000 visiting the stores. The letter goes on to say that over 1200 Arizonans had invested in the Arizona

corporation and that as announced in a previous letter it is customary for successful corporations to issue certain rights and that, accordingly, the board of directors had decided to issue to the stockholders an allotment certificate. The stockholders are advised that advantage be taken of this offer. (Government's Exhibit 84) (339, 340).

Various, oral representations were also testified to as having been made. For example, one witness testified that a statement was made to the effect that the corporation was a "great company"; that they were not allowing anybody in there but people who belonged to the Masonic Order and that he would get his money back in three years or before (300). Another witness testified that she *believed* that she was told that the corporation had twenty-five stores in New Mexico and Arizona and forty in California; that they had the buildings and the fixtures paid for; that land had been purchased and within ninety days the buildings would be up and would start business (320, 321).

During their operations in the sale of the stock and debentures, Mrs. Addie Driscoll wrote to the Bond and Mortgage Corporation and she testified that, in reply (272) she received through the mails Government's Exhibit 43, (273) being a letter addressed to her and taken out of the mails at the Douglas Post Office. She said, "I am pretty sure that it was enclosed in that envelope, but wouldn't swear it is the same envelope" (272). This letter was dated April 9, 1930 and was signed "Bond and Mortgage Corporation by M. Loveland, Assistant Secretary." It is as follows:

"Bond and Mortgage Corporation
Security Building
Phoenix, Ariz.
April 9, 1930.

Addie Driscoll
Box 103,
Douglas, Arizona.

Dear Madam:

Answering your letter of April 8th, we wish to advise that the Common stock of the United Clarence Saunders Stores, Inc., is being offered to the public through this company for $10.00 per share.

Trusting that this is the information you desire, we are,
Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. LOVELAND,
Assistant Secretary."

This is the letter, the mailing of which constitutes the only violation charged of Section 215 of the Penal Code. It was admitted in evidence over objection. There was no identification whatsoever of the signature of "M. Loveland" to this vital exhibit.

As to many of the letters and notices introduced in evidence and read to the jury, it appeared that appellants had no connection with them and that when the same were transmitted appellants had terminated all of their activities in connection with the Sanders enterprise, Sanders testifying that the connection of appellants with his company terminated the latter part of 1930, (348) and Brandt testifying that there was little activity in the sale of stock by the end of June, 1930 (331). Sanders also stated

that appellants had nothing to do with the sale of the stock after the name was changed to "United Sanders Stores, Inc." (358.) This took place on November 1, 1930 (211).

With the advent of the unapprehended defendant, H. D. Sanders, into the enterprise, it appeared from the evidence that an entirely new situation came into being with which appellants had no connection. A notice was sent to the stockholders on October 6, 1930, signed by Mr. G. C. Partee, the Secretary of the company, and one of the Government witnesses, in which the proposed connection with the U-Save Holding Corporation is for the first time disclosed and the names of H. D. Sanders Associates revealed. The defendant, A. E. Sanders, is recited in this exhibit as the man who would have control of the Financial Department of the reorganized company. (Government's Exhibit 54) (281). Another letter was addressed to the stockholders, dated January 15, 1931, signed by H. D. Sanders, as President, and the said G. C. Partee, Secretary, and reciting that the U-Save Holding Corporation had acquired control of the common stock of the company under inquiry (Government's Exhibit 56) (289). Another instance of similar character is Government's Exhibit 53 (280), a form letter to the stockholders from Mr. A. E. Sanders, calling attention to the coming stockholders' meeting to be held November 1, 1930. Yet another of these exhibits evidencing a situation with which the appellants were shown to have no connection was received in evidence as Government's Exhibit 64 (297) also signed by the witness, G. C. Partee, reciting that in October of 1930, the U-Save Holding Corporation had purchased the control of the common stock of United Sanders Stores, Inc., and attaching a balance sheet showing a net worth of $939,944.06 (299).

One of the major charges against appellants both from the standpoint of the indictment and the evidence centered about the payment of dividends upon the preferred stock. The indictment alleged that it was a part of the scheme that the defendants should and they did authorize and pay a semi-annual dividend of eight per cent to preferred stockholders of record as of April 30, 1939 (meaning, doubtless, 1929), payment being made on June 29, 1929 (5, 6). No evidence was introduced as to the payment of any dividend in June of 1929, the Government introducing evidence of the payment of a dividend one year later, in June of 1930, an event not charged in the indictment.

Evidence was, also, introduced of the payment of a dividend upon preferred stock to holders of record as of December 31, 1929. As to this last mentioned dividend, which was the first paid, Brandt testified (329) that during the month of December, 1929, he had a conversation with A. E. Sanders in the presence of appellant, Gus Greenbaum. He said that it was so long ago that he didn't remember the details but that the substance of the conversation was that A. E. Sanders told him (Brandt) that he wanted dividend checks prepared on the preferred stock which was fully paid up and a list of credit entries on subscriptions for preferred stock which were not paid up. Brandt said that he told Sanders at the time that he didn't see how a dividend could be paid and said "We have no earnings." He testified, further, that he went into the outer office and brought in a record showing the operating loss and there was a discussion as to whether or not there was in fact a loss (330). He said "*I don't remember that Gus Greenbaum said anything at that conversation. Mr. Sanders was the one who wanted me to prepare the checks and the*

lists." The dividend was paid to the stockholders and subscribers of record on the last day of the same month at which the conversation is alleged as having taken place, i. e., December, 1929, the actual payment being made after January 1, 1930. This same witness testified that he prepared a statement of the financial condition of the company as of December 31, 1929, *the dividend date*, and delivered it to Mr. A. E. Sanders. He gave appellant, Gus Greenbaum, a number of mimeographed copies (333). He said, further, that appellant, Gus Greenbaum, had nothing whatsoever to do with the preparation of this statement or with the entries in the books of the company back of the statement (334). It was mailed to various commercial houses to build up the credit of the concern (335). *Mr. Brandt said further that the statement was true* (333). This document (Government's Exhibit 40) (335) shows that on December 31, 1929, immediately prior to the actual payment of the dividend, the company had a net worth of $884,190.46 and a *surplus of $33,780.46.* The cash on hand alone, *as shown by this exhibit of the Government* was $51,-326.72. The total current assets amounted to $373,-701.70, while the current liabilities aggregated only $117,458.33 (336). The witness stated that he could not determine from the statement itself whether it reflected a capital or earned surplus (336). That it was made up of two accounts, Capital Surplus and Earned Surplus.

The record discloses that a second dividend was paid to preferred stockholders of record as of June 30, 1930, an event, as has been said, not charged in the indictment. The same Government witness, Brandt, testified, in substance (330), that in June of 1930 he had a discussion with appellant, Gus Green-

baum, with reference to the payment of a dividend for the first six months of 1930 and he said further, "We didn't have any money to pay these checks with. Mr. Greenbaum said that they must be paid. I don't recall any other conversation, but the dividends were paid" (330). The checks referred to by the witness had been signed by A. E. Sanders before he left for Kansas. The witness testified that at the time of this conversation he showed Mr. Gus Greenbaum the "usual operating statement," which showed a loss of approximately $96,000.00 (331). *This operating statement was not introduced in evidence.* The money to pay this dividend, he said, came from a loan from appellant, Gus Greenbaum, in the amount of about $8000.00 and a payment by A. E. Sanders Company, the Piggly Wiggly Southwestern, in the amount of $7000.00. The balance of the dividend was made up from receipts from the stores (330). Dividend for 1930 totaled $25,200.02 (381).

The Government's evidence discloses that this same witness, Brandt, approved a financial statement of the company as of this dividend date, June 30, 1930, which had been prepared by another Government witness, Mr. G. C. Partee, and submitted to the defendant, A. E. Sanders. This statement was spread upon the books of the company, which was introduced in evidence as Government's Exhibit 22, and appears on pages 26 and 27 thereof (249). It discloses that on June 30, 1930, there was cash on hand and in the banks in the sum of $45,334.37; that the current assets totaled $446,272.13, while the current liabilities was only $126,965.56. *The statement shows a surplus (approved by Brandt) in the sum of $185,392.60 and is certified as correctly reflecting the financial position of the company by John W. Wagner, a Certified Public Accountant* (250).

It will be seen from the foregoing narrative of the facts that the representations constituting the alleged means of the asserted scheme to defraud may be grouped into three general classes which, in their order of probable importance, are as follows:

(1) The payment of dividends out of capital and not out of earned surplus.

(2) The representations as to the progress and condition of the company and the prospective value of its stock.

(3) The representations to the effect that the corporation was in some manner under the guiding hand of the original Clarence Saunders.

Having introduced evidence of the representations and the payment of dividends, the Government next sought to prove falsity by demonstrating the true condition. For this purpose one L. D. Null, was called as a witness and testified that some time before, and in connection with another matter, he had made an examination of the books and records of the corporation from which he prepared profit and loss statements of the company for the year 1929 and for the nine months of the year 1930 ending September 30th, which were, over objection, introduced in evidence as Government's Exhibits 89 and 90, respectively (366, 374). These statements purported to disclose an operating loss for the year 1929 of $108,885.42 and a net loss to surplus for the first nine months of the year 1930 in the sum of $56,045.19.

The objection of appellants and their subsequent motion to strike these exhibits from the record, in addition to the motions for directed verdict and the formal motions thereafter, was based upon the

grounds that sufficient opportunity had not been accorded appellants to examine the underlying sources from which these profit and loss statements were made; that the books and records which underlay the statements had not been introduced in evidence; that there had not been a proper identification of such books and records as were present in court in the possession of the Government; that there had been no attempt to produce the people who made the entries or anyone having personal knowledge of the facts, there having been no showing that such persons were dead or otherwise unavailable; that there was no sufficient testimony as to the correctness or regularity of the entries from which these statements were compiled; that the original entries were not even present in court; that the books and records were shown to be incomplete; that there was no showing that appellants had anything to do with the books and records underlying the statements which made these exhibits pure hearsay as to appellants, and that they were not the best evidence (367).

Certain of the books of account of the company were marked for identification as Government's Exhibits 34 to 39, inclusive. These books so marked for identification were: a record of cash and disbursements; the cash receipt record; the record of cash receipts from September 1, 1930 to October 1, 1930; the journal register; the record of stock sales and subscription agreements; and the general ledger of the company (255, 259). There was no identification of these books or testimony as to their correctness or regularity for the period prior to September 15, 1929 (251) although at the time of Mr. Bird's second application for a permit to sell the company's stock, on March 19, 1929, the stock authorized to be sold

by the first permit had been over-subscribed and the Tucson program financed and launched. By this time the company had acquired assets and liabilities (229, 230). G. C. Partee succeeded Brandt as bookkeeper and auditor and supervised the entries from August, 1930, to "about October, 1930" (258). There was no identification of the books and records, therefore, for the period commencing with the incorporation of the company on October 25, 1928 (209) to September 15, 1929, the first ten months' period of the existence of the corporation, and no identification for the period after an indeterminate date in October of 1930, thus disclosing a tacit admission by the government that from October 1930 on, appellants were not associated with the enterprise. Both Brandt and Partee testified that all of the books and records of the company which underlay the Null summaries were not present in court, Brandt testifying, among other things (252):

> "I have examined the books and will say that the accounts of the company that eventually blend into the general ledger are missing—This book, such as checks, vouchers and bills rendered. They are not here. Neither is the payroll and the detailed information that is accumulated through your journal and cash records, such as substantiates these records. These records are not here."

Partee said:

> "These are not all the books that were kept by the company. * * * *"

After mentioning the stock ledger, transfer record, etc., he said:

> "There are other books that are not here, such as accounts receivable and the accounts payable,

> and the detail record of the operation of the various stores and things like that. No inventories are available here * * * The detailed operating records were kept in permanent form I would say * * * monthly trial balances were made throughout the time I was with the company up to the time the books were taken to Los Angeles. None of those are here, nor are they in these books I have just examined (meaning Government's Exhibits 34 to 39, inclusive, for identification). There were several operating books in which the operating accounts were kept, which I could not name at the present time but they are not here" (259, 260).

Null himself stated that he examined not only the books which were identified but never introduced in evidence, but many other records, probably, he said, "hundreds of documents" (363). The work, done in connection with another matter appertaining to the receivership of the corporation, consumed one hundred eighty-five or one hundred eighty-six days of his own time, one hundred sixty-six days of his partner, Mr. Woods' time and one hundred fifty-nine days of Mr. Bradford's and fifty-two days of Mr. Ray's time (362). Furthermore, he stated, in order to check and verify the profit and loss statements offered in evidence (Exhibits 89 and 90) "a tremendous amount of work would be necessary" (362). "If you employed," he said, "an accountant it would take two or three weeks at least, and maybe longer" (363). Later he said "To examine the books and records which underlie the tendered profit and loss statement I would say it took three men about four or six weeks. It would take one man about eighteen weeks" (364).

Testifying as to Government's Exhibit 90, Mr. Null said: "I would not assume that the books and records

on the table are sufficient underlying data to make up a verified profit and loss statement from. In other words, in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369). It appeared that one of the exhibits (Exhibit 91) was compiled from the books which were in court "on the table" (369), and the witness was able to state that the exhibits were correct, not because, however, they could be verified from "the books on the table," but because of a detailed examination not only of the books present but of hundreds of other records and documents. He said *"It is because of my previous acquaintance with the other books and records that are not here that I am able to prepare this tendered statement."*

During the trial and the examination of Mr. Null, the government admitted that the records identified and in court were but *summaries* of original entry books. Mr. Null had stated that it was because of his previous acquaintance with the other books and records which were not in court that he was able to prepare the tendered statements (370). In a motion to strike this statement, the following passage took place between Mr. Dougherty, of counsel for the Government, and the Court:

> "MR. DOUGHERTY: I ask that the answer be stricken because he has already answered the question.
>
> THE COURT: It may be stricken.
>
> MR. DOUGHERTY: On the ground that the witness did not say what counsel put in his mouth or attempted to put in his mouth. He said that this profit and loss was compiled from those

books on the table and these books on the table he has testified IS A SUMMARY of his examination of all the books.

THE COURT: You don't mean that?

MR. DOUGHERTY: These books ARE A SUMMARY, your Honor, of the original entry, books (370).

The witness thereupon repeated that he could prepare these exhibits from the general ledger that was on the table *because he had already examined other books and records which were not in court* (371).

To prove the financial condition of the company on and prior to the date of the alleged commission of the offense the Government offered, and there was introduced in evidence, Exhibit 91 (378) which purports to be a general balance sheet as of September 30, 1930, a period approximately six months after the date of the commission of the offense charged; to the admission of which appellants objected, and the document was subsequently moved to be stricken upon similar grounds urged to the introduction of Exhibits 89 and 90. It should be noted that this exhibit, which was prepared the evening before it was offered, contains the wholly inadmissible item, "Net worth *September 30, 1934*, $1,066,636.03." Mr. Null testified that there was a deficit of $679,000.00 (380). The exhibit itself discloses a deficit of $215,-378.47 (378). To arrive at the larger deficit, Mr. Null computed the Saunders franchise or license agreement as of no value, the organization expense as of no value, and deducted, as a liability, the common stock outstanding of no par value in the amount of $405,014.50. In the preparation of the statement, however, Mr. Null included organization expense as

an asset in the sum of $304,644.88. This "expert" had some difficulty, apparently, with his addition because he stated that adding this figure of $304,644.88 to the deficit shown in the exhibit, $215,378.47 would create a deficit of about $679,000.00, missing by approximately $8000.00.

In the preparation of the purported balance sheet of September 30, 1930, (Government's Exhibit 91) and the incident determination of the value of the fixed assets, Mr. Null stated that it was necessary for him to refer to the general audit made at the time of the appointment of the receiver for the company in the state court, and he stated he could still prepare it but he "would not vouch for the accuracy of that balance sheet in the absence of the missing books and in the absence of my experience in the first audit" (383). He stated further, "I said that the franchise in question had no value whatsoever but I *couldn't answer* the question as to whether or not the franchise would have a value at the time of the original entry setting it up in the books was made. I would say that the franchise had no value on September 30, 1930 * * * * because the company was not operating under it" on that date (384).

As the case approached its termination, Brandt, whose testimony on behalf of the Government covers one hundred forty-six typewritten pages, and approximately sixty-three pages of the printed Bill of Exceptions, was recalled for the purpose of identifying certain exhibits, the total purport of which was to show that appellants had received from the defendant, A. E. Sanders, and sold some of Sanders personally owned common stock. He had testified that for the period of his employment, the books and records underlying the Null summaries were true and correct,

saying, "During all of the time I was in charge of the books of the company I truly and accurately kept the accounts" (415). On cross-examination he admitted one large item of $5000.00 to be a fictitious and false entry. He said, in part, "I knew of a shortage of accounts at the Sanders Stores while I was Comptroller *** I will testify to the statement a while ago that there was a three-cornered deal to be repaid by the Kansas unit (with which appellants had no connection) in that I called it a shortage. It was *not* subsequently made good by the Kansas unit *** (417). *Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry* and I showed it as a check to the Phoenix Packing Company for $5000.00, and on the duplicate voucher I showed a charge against the Kansas unit, and put $4400.00 in the Citizens State Bank at Five Points because on June 30th we had to make a return to the Corporation Commission on the sale of stock (with which appellants had no connection) and it required that the money be put up there" (418).

Counsel for appellants thereupon endeavored to show that as to at least $2500.00 of this $5000.00 item, Brandt was an embezzler, and to this end offered in evidence as defendants' Exhibits, four checks marked Defendants' Exhibits F for identification (422, 423). Having deposited $5000.00 of the corporation's funds to the account of the Phoenix Packing Company in the Valley Bank, Brandt proceeded to draw and sign the checks, one dated July 24, 1930, in the sum of $500.00, another dated July 1, 1930, in the sum of $500.00, another dated July 24, 1930, in the sum of $100.00 and another dated July 2, 1930, in the sum of $2000.00, all to his own order. Each

of the checks showed that they were paid upon endorsement by Tom H. Brandt.

Appellants also offered in evidence as Defendants' Exhibit E, a document, so marked for identification, being a statement of Tom H. Brandt made on August 11, 1930, consisting of eleven typewritten pages in which this witness admitted that he took $5000.00 from the United Clarence Saunders Stores, Inc., deposited it to the account of the Phoenix Packing Company, from which he checked out $2500.00 to himself (419), although he had stated, under oath, on the trial, "I didn't say that I had taken some of the Phoenix Packing Company money which I got from Sanders Stores and put it to my own account, and I didn't do that" (417). He also admitted that he did not resign but that he was discharged at the time the embezzlement was discovered.

The court conceded that the witness had testified that one of the entries in the books was fictitious but refused to permit appellants to impeach Brandt and demonstrate his dishonesty. The court said, "This witness has testified that one of the entries in that book is fictitious. It strikes me that satisfies your inquiry" (425).

Appellants then made an avowal, offering to prove that, if permitted to cross-examine Brandt, he would testify that, in the presence of the persons named in his typewritten confession, he would say that he did state to them that there was a shortage of $5000.00 in the account of the corporation; that he was responsible for the shortage and that out of that sum he had checked out $2500.00 for his own personal use by means of the device of depositing a check of the company to the account of the Phoenix Packing Com-

pany and drawing upon those funds for his own benefit (425, 426). The Government's objection to the avowal was sustained.

Thereafter, Mr. L. D. Null was recalled for further cross-examination and repeated what he had stated previously that there were only a few missing items or missing accounts in the books of the corporation when they came to him for examination, and said further that Mr. Walter A. Wood was his partner. Appellants then offered in evidence Exhibit G for identitfication, which was an application of Mr. Walter A. Wood for auditor's fees in connection with an audit made of United Clarence Saunders Stores, Inc., for the purposes of a case pending in the Superior Court of Maricopa County, Arizona. The objection to the exhibit was sustained. In the application so tendered as an exhibit, Mr. Wood stated in effect, that a large part of the books and records of the company were so incomplete that "your auditor was required, in ordere to reach a satisfactory and accurate conclusion, to rebuild many of the voluminous transactions carried by said defendants from extraneous material" (430).

The objection of the Government being sustained upon the ground that the exhibit was prepared by someone not a witness, Mr. Null, resuming his testimony, said that there were a few missing matters of no great importance. And he testified, "It is not true that a large part of the books and records of the stores were so incomplete that the auditors were required in order to reach a satisfactory and accurate conclusion to rebuild many voluminous transactions carried on by the corporation" (431).

After the Government witness, Brandt, had testi-

fied to the false entry alluded to, and had made the admissions hereinbefore set forth, and after Null had testified that it had taken over five hundred man-days to examine the books of the corporation and that he examined literally hundreds of records and documents but that, nevertheless, there were only a few missing items in the books of the company, the Government proceeded to call Roy N. Davidson, acting Collector of Internal Revenue for the District of Arizona, for the purpose of introducing income tax information showing that the company had suffered operating losses during the years 1929 and 1930, but the witness refused to testify as to any records in his possession under regulations or instructions of the Government. Thereafter the witness testified that the only records that he had in his office were *card records of the filing of the returns.*

He said *he did not have the returns or copies thereof* and that the same were in Washington (432).

At the court's suggestion the defendant, A. E. Sanders, was placed upon the witness stand for the purpose of consenting, on behalf of the taxpayer, to the introduction of these cards in evidence, and when it appeared that Sanders was not, at the time of his testimony, the President of the company, the court said, "That leaves us in another embarrassing position" (435).

On the following day Mr. Davidson took the witness stand and stated that he then had authority to testify in regard to the records as shown by his records of the corporation under consideration. This authority was in the form of a telegram "authorizing the acting Collector of Internal Revenue at Phoenix, Arizona, to testify with reference to income tax return of the

company for the years 1929 and 1930." The telegram was signed "Helvering, Commr" (437). Over the objection of the defendants, the telegram was admitted in evidence.

The Government then proffered, and there was received in evidence, Exhibits 109 and 110 (442, 446) which the witness stated were instruments constituting the permanent records kept in the regular order of business in his office.

As to Government's Exhibit 109, there is no supporting data, and without any information called for and contemplated by, the card itself, as to capital stock, indebtedness, etc., in the column under the year 1929, there is a figure, after the words "Gross Income," $125,588.45, and after the words "Net Income appears," for the same year, "loss $150,271.53" (442).

As to Government's Exhibit 110, the income tax card for the year 1930, none of the blanks are attempted to be filled excepting an item after the words "Gross Income" $306,054.21, and after the words "Net Income" loss $135,626.67 (446).

On his voir dire examination Mr. Davidson said that he did not know whether the entries thereon were correct of his own knowledge; that the original income tax returns he presumed were in Washington and that while he knew the entries were made by one Mr. Cornish, who was dead, under his general charge of the office, he didn't know anything about the entries himself, whether they were true and correct nor whether they were correctly copied from the original tax returns. He stated further that he didn't know who signed the original income tax returns (438, 441). The court said, "*There is no doubt but that the*

return itself would be the best evidence" (440) but, nevertheless, the documents were received in evidence over the particularized objection of appellants.

With the introduction of these income tax cards the Government rested.

Appellants thereupon moved the court to strike each of the Government's exhibits, objection to which had theretofore been made, and to instruct the jury to disregard them and the evidence in connection therewith. The motion was denied (449).

Then appellants moved for a directed verdict finding them not guilty, and after the deniel of that motion the defendants rested and the Government rested. The motion for directed verdict was renewed by appellants at the close of all the evidence upon grounds identical with those urged in the motion made at the close of the Government's case (449-455).

The court instructed the jury at considerable length, after which a verdict of guilty was returned as to each of appellants (183-184). Motions for new trial and in arrest of judgment having been made and overruled (185-193), the Honorable F. C. Jacobs as the Judge presiding, suspended the imposition of judgment and sentence as to the defendant, A. E. Sanders, who had pleaded *nolo contendere*, and sentenced each of appellants to imprisonment for the term of four years from December 11, 1934.

QUESTIONS PRESENTED

From the record of the proceedings the following questions are presented:

(1) Is the indictment fatally defective? This ques-

tion was raised by appellants' separate demurrers and motions to quash (101, 111, 116, 122, 129).

(2) Were Goverment's Exhibits 89, 90 and 91, the financial statements prepared by L. D. Null, admissible or inadmissible? This question was raised by objection to the introduction of the exhibits (375, 379) by motion to strike (449), by the motions for directed verdict (449) and by the formal motions after verdict.

(3) Were Government's Exhibits 109 and 110, the income tax cards, admissible or inadmissible? This question was raised by objection to the introduction of these exhibits in evidence (443, 447) by motion to strike (449), by the motions for directed verdict (449) and by the formal motions after verdict.

(4) Was the cross-examination of Tom H. Brandt unduly restricted and appellants erroneously prevented from further demonstrating the untrustworthiness of this witness whose testimony was essential to the Government's case? This question was raised by avowal (425), and by the offer and refusal of Defendants' Exhibit E (418) and F (422, 423) for identification.

(5) Did the Government fail to prove by any competent evidence whatsoever certain material allegations of the indictment, and the Court therefore err, upon additional grounds, in overruling appellants' motions for directed verdict? This question was raised by the motions for directed verdict (449), and the formal motions after verdict.

(6) Did the Government not only plead but attempt to prove, by the introduction of evidence, two distinct

schemes to defraud, as to one of which appellants had no connection? This question was raised by motion at the opening of the trial (208), by objection to the introduction in evidence of testimony and exhibits appertaining to the H. D. Sanders operation (221), by the motions for directed verdict (449) and by the formal motions after verdict.

(7) Did the evidence, instead of proving the offense as laid in the indictment, affirmatively disclose that there was no combination in unlawful intent or activity on the part of the defendants? This question was raised by the motions for directed verdict (449), and by the formal motions made thereafter.

(8) Did the court err in instructing the jury? The instructions complained of were attacked by objection and exception (480).

SPECIFICATION OF ERRORS RELIED UPON

Although other errors are assigned, appellants will urge a reversal of this cause upon the following specification of errors:

1. The Court erred in overruling the separate demurrers of appellants to the first count in the indictment, for the following reasons, to-wit:

(a) Because the first count of the indictment fails to set forth facts sufficient to constitute an offense against the United States of America under Section 215 of the Criminal Code of the United States of America (Section 338, Title 18, U.S.C.A.) or under any other law or statute of the United States of America.

(b) Because the first count of the indictment is vague, indefinite, uncertain and incomplete.

(c) Because the first count of the indictment is duplicitious and multifarious, in that it charges more than one scheme or artifice to defraud, and more than one offense in violation of Section 1024 of the Revised Statutes of the United States (Section 557, Title 18, U.S.C.A.). (Assignment of Error II.)

2. The Court erred in denying the motion of appellants made at the close of the Government's case and again made at the close of all of the evidence, that the court direct the jury in said cause to return a verdict for appellants finding them not guilty on the ground and for the reason that there was no substantial competent evidence to sustain the charge made in the first count of the indictment and upon the further grounds, to-wit:

(a) That there was no competent or substantial evidence to show that the defendants named in the first count in the indictment devised or intended to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged therein.

(b) That there was no competent or substantial evidence to show that the representations and promises charged as being made by appellants were false and fraudulent, as charged.

(c) That there was no competent or substantial evidence to show appellants mailed or caused to be mailed the letter set forth in count 1 of the indictment (Assignment of Errors III and IV).

3. The Court erred in denying appellants' motion to direct the jury to return a verdict, finding them not guilty, at the close of all the evidence, for the reason

that the evidence introduced by the plaintiff, United States of America, in attempted support of the allegations contained in the first count of the indictment constituted a material variance from the charge made in the first count of the indictment, in this, to-wit:

(a) That the first count of the indictment charged that appellants sold to the persons to be defrauded more than three-fifths of the 35,000 shares of common stock issued and sold to the defendant, A. E. Sanders, whereas the evidence showed that the stock sold by appellants came from the 151,000 shares of common stock issued to A. E. Sanders pursuant to a permit of the Arizona Corporation Commission.

(b) That the first count of the indictment charged that appellants authorized and paid a semi-annual dividend on June 29, 1929, whereas there was no evidence of any such dividend being paid, but the evidence related to a dividend of July 30, 1930.

(c) That the first count of the indictment charged, as a further part of said scheme and artifice, that H. D. Sanders and his associates organized and incorporated the Piggly Wiggly Holding Corporation, afterwards changed to the U-Save Holding Corporation, whereas the evidence shows that appellants had no act or part in said transaction and were not connected therewith in any way.

(d) That the first count of the indictment charged that the U-Save Holding Corporation took charge of the assets of the United Clarence Saunders Stores, Inc., and removed $100,000.00 worth of merchandise from Arizona to Los Angeles, whereas the evidence showed that appellants had no act or part in said transaction.

(e) That the first count of the indictment charged that the letter to Addie Driscoll was mailed for the purpose and with the intent on the part of appellants of executing the scheme and artifice, whereas the evidence shows that the scheme to defraud as to Addie Driscoll was fully executed prior to the time the crime is alleged to have been committed, to-wit, April 9, 1930 (Assignment of Error V).

4. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 89, which is in full substance as follows:

UNITED SANDERS STORES, INC.

STATEMENT OF PROFIT AND LOSS			Year 1929
Grocery Sales		816,695.36	
Market Sales		179,709.22	
Gross Sales			996,404.58
Merchandise Purchased		1,103,646.32	
Less Inventiory December 31, 1929		250,726.77	
Cost of Goods Sold			852,919.55
Gross Profit			143,485.03
Less Operating Expense:			
(Detail of Items omitted (366)			262,190.62
NET LOSS ON SALES			118,705.59
Plus Other Expense:			
Interest	3,473.61		
Unclassified Losses	1,531.42		
Loss on Bad Checks	811.87		
		5,816.90	
Less Miscellaneous Gains:			
Earned Discount	9,315.75		
Unclassified Gains	6,321.32	15,637.07	9,820.17
Total Operating Loss			$108,885.42
Analysis of Surplus Account:			
Operating Loss for 1929			$108,885.42
Payment of Dividend on Preferred Stock			25,743.16
Amortization of Organization Expense			10,000.00
TOTAL SURPLUS DEFICIT			$144,628.58

for the following reasons:

(a) That sufficient opportunity had not been accorded appellants to examine the sources from which said profit and loss statement was made.

(b) That the books, records, data and memoranda that underlie said statement had not been introduced in evidence.

(c) That there had been no proper identification of the books and records that were in court.

(d) That there was no attempt to produce the people who made the entries, or anyone having personal knowledge of the facts, and that there had been no showing that such persons were dead, insane, or beyond the reach of process of the court, and that they were not available.

(e) That there was no underlying testimony as to the correctness or regularity of the entries from which said profit and loss statement was compiled.

(f) That the original entries were not in court and the books and records were shown to be not complete.

(g) That said profit and loss statement was not the best evidence.

(h) That said profit and loss statement was hearsay as to appellants. (Assignment of Error XI.)

5. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 90, which is in full substance as follows, to-wit:

UNITED SANDERS STORES, INC.

PROFIT AND LOSS STATEMENT NINE MONTHS ENDED 9/30/30

Sales			
Retail Grocery		$1,029,675.94	
Retail Meats		293,921.72	
Wholesale		351,033.80	
Total Sales			$1,674,631.46
Cost of Sales			
Retail Grocery		842,076.42	
Retail Meats		223,654.48	
Wholesale		331,294.54	
Total Cost of Sales			1,397,025.44
Gross Profit from Sale			277,606.02
Expenses:			
(Detail of Items omitted) (374)			332,172.57
Net Loss Before Other Income & Expense			54,566.55
Other Income			
Interest	161.51		
Discount	8,492.75		
Freight & Delivery	460.32	9,114.58	
Other Expenses			
Cash Discount allowed	571.34		
Interest Paid Miscl.	2,196.55		
Interest Paid Bonds	2,917.15		
P & L Items	3,779.64		
Cash Short	1,128.54	10,593.22	1,478.64
Net Loss to Surplus			56,045.19
Profit & Loss Items			
Loss in Merchandise Inventory		5,678.65	
Miscl. Items		67.29	
		5,745.94	
Less: Sundry Credits		2,066.30	
		3,779.64	

for the same reasons set forth in the preceding specification number 4. (Assignment Error XII.)

6. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 91, which is in words and figures as follows, to-wit:

UNITED SANDERS STORES, INC.
BALANCE SHEET—September 30, 1931 (1930)

Assets		
Current Assets		
Cash in Bank	1,686.81	
Cash & Imprest Funds	7,225.00	
Accts. Receivable	25,658.82	
Merchandise Inventory	299,782.45	
Stock Subscription Receivable	91,657.95	
Total Current Assets		426,012.03
Investments		
Miscl. Stocks & Bonds	4,617.29	
United Sanders Debenture Bonds	80,000.00	
Piggly Wiggly Southwest Co.	143,880.00	
Total Investments		228,497.29
Fixed Assets		
Fixtures & Equipment	198,899.26	
Less: Allowance for Depreciation	30,355.98	
Residual Value		168,543.28
Deferred Items		
Supplies on Hand	1,579.59	
Prepair Expense	16,959.70	
Recoverable Deposits	2,471.16	
Organization Expense	304,644.88	
Total Deferred Items		325,655.33
Concessions		151,000.00
		1,299,707.93
Current Liabilities—Liabilities & Net Worth or Capital		
Bank Overdraft	12,456.32	
Piggly Wiggly Southwest Co.	8,774.70	
Accounts Payable	28,396.62	
Accrued Payroll	3,178.00	
Notes Payable	18,156.77	
Contracts Payable	3,209.49	
Total Current Liabilities		74,171.90
Fixed Liabilities		
Bond or Debentures		158,900.00
Total Liabilities		233,071.90
Capital and Surplus:		
Preferred Stock Issued and Outstanding	877,000.00	
Common Stock Issued and Outstanding	405,014.50	
Total Capital Stock	1,282,014.50	
Deficit	215,378.47	
Net Worth September 30, 1934		1,066,636.03

for the same reasons set forth in the preceding specifications numbered 4 and 5. (Assignment of Error XIII.)

7. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America,

over the objection and exception of appellants, Government's Exhibit 109, a document headed — "INCOME TAX, Ariz. Clarence Saunders Stores, Tucson, Arizona"—being Treasury Department, U. S. Internal Revenue, Form 649, Revised Sept. 1926, (for corporations), which is in full substance as follows:

(Date of Organization)	(Name of President)
10/25/28	?
(State in Which Organized)	(Name of Treasurer)
Ariz.	?

	1928	1929	1930
Return filed	3/15/29	2/25/30	
List (month-year)	851.11		
List (page-line)		85 217	
Gross Income	$	$125,588.45	$
Net Income	Loss None	150,271.53	See card United Sanders Stores, Inc.

for the following reasons:

(a) That it is not the best evidence.

(b) That it is hearsay as to appellants.

(c) That the document is not signed by anyone and shows on its face that it is not complete.

(d) That there was no foundation laid for the introduction of the document.

(e) That there was no opportunity afforded appellants to examine the person who made the entries on the document, or to cross-examine the person who made the original income tax return.

(f) That there was no showing as to who signed the original income tax returns.

(g) That the original income tax returns were in the custody of the Government and under the Act of Congress (February 24, 1919) were available as pri-

mary original evidence. (Assignment of error XV.)

8. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 110, a document headed — "INCOME TAX, United Sanders Stores, Inc. (formerly Ariz. Clarence Saunders Stores), 305 So. 2nd Ave., Phoenix, Ariz." being Treasury Department, U. S. Internal Revenue, Form 649, Revised Sept. 1926, (for corporations), which is in full substance, as follows:

(Date of Organization) Nov. 23, 1928

(Name of President)

(State in Which Organized) Arizona

(Name of Treasurer) Geo. J. Erhart, Receiver

	1930	1931	1932 FINAL (Remarks)
Return filed	3-16-31	10-3-1932	3-20-33
List (month-year)	86 349	86 644	86 263
List (page-line)			
Gross Income	306,054.21		
Net Income Loss	135,626.67		
			Out of business Final
Total Tax	none		

In receivership and process of liquidation

for the same reasons set forth in preceding specification number 7 (Assignment of Error XVI).

9. The Court erred in sustaining an objection of the plaintiff, United States of America, over the exception of appellants, to an offer of proof by appellants, in full substance as follows:

> At this time the defendants, Greenbaum, and each of them, avow that the witness, Brandt, would testify that at such conference and in the

presence of the persons named, he did state to them that there was a shortage of $5,000.00 in the account of the United Clarence Saunders Stores, and that he was responsible for the shortage, and that out of the $5,000.00 by him taken from the United Clarence Saunders Stores, he had checked out the sum of $2,500.00 for his own personal use, in separate checks, and if asked how this shortage of funds from the Stores Company was effectuated or consummated, would testify in response thereto that checks of the Stores Company were made up in duplicate, and that the original check figuring in this transaction, that is, the check of $5,000.00 in its original form showed payable to the Phoenix Packing Company, but that the duplicate check showed United Clarence Saunders Stores, and that the explanation on the duplicate check was was that the sum of $5,000.00 had been advanced to the Kansas unit, and that accordingly the books of account of the Sanders Stores here showed an entry or a charge of $5,000.00 as organization and development expense, when in truth and in fact such entry was false and was but a device to cover up the speculation or embezzlement of the witness, Brandt. We avow that if permitted to ask the witness, Brandt, as to the time in which he took $5,000.00 of the Stores Company's money for his own personal use, he would state it was taken around about the 26th or 27th of June, 1930, in the form of check on the Saunders Stores, signed by himself, drawn upon the First National Bank of Phoenix and that the withdrawal was charged against the Kansas unit to organization and development expenses. We will avow if permitted to ask the witness Brandt what disposition was made by

him of the money withdrawn from the Saunders Stores he would testify that he deposited $2,-000.00 of that embezzled sum in the Commercial National Bank of Phoenix, and that he afterwards withdrew from the Commercial Bank from time to time the sum in question, and that he subsequently deposited $1,000.00 of the funds so taken from the Stores Company to his personal account in the First National Bank, and that the money so taken by him through the scheme was used for his own personal use, and that it was covered up by a fictitious entry in the books of the company, and we avow further that it can be developed through this witness that many of the books and records of the company were kept by him at his own home, and not at the company office, for the purpose of concealing these transactions, which books and records are not now present in court.

for the reasons:

(a) That appellants should have been allowed to test the credibility of the witness.

(b) That such evidence offered would tend to show that the books and records of the corporation were incorrect (Assignment of Error XXV).

10. The Court erred, over the exception of appellants, in refusing to admit in evidence appellants' Exhibit "F" for identification, consisting of four checks, said checks being offered for the purpose of impeaching the witness, Tom H. Brandt, and further establishing that the books and records of said corporation, Government's Exhibits 34 to 39 for identification, both inclusive, did not correctly set forth

the transactions of said corporation, which said checks are in full substance as follows:

Check No. 16, of the Phoenix Packing Company, drawn on The Valley Bank of Pohenix, Arizona, dated Phoenix, Arizona, 7/1/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $500.00, and endorsed "Tom H. Brandt," showing payment thereof on July 1, 1930.

Unnumbered check of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, 7/2/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $2,000.00, and endorsed "Tom H. Brandt," showing payment thereof on July 3, 1930.

Check No. 41, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/2/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $500.00, and endorsed "Tom H. Brandt," showing payment thereof on July 25, 1930.

Check No. 42, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/24/30, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $100.00 and endorsed "Tom H. Brandt," showing payment thereof on July 24, 1930.

(Assignment of error XXVI) (422, 423.)

11. The Court erred in admitting in evidence in

behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 5, being a document which in full substance is as follows:

> Articles of Incorporation of Piggly Wiggly Holding Corporation of Yuma, dated April 27, 1929, and filed in the office of the Arizona Corporation Commission on May 15, 1929, at the request of Wm. H. Westover, of Yuma, Arizona. Incorporators: H. D. Sanders and S. I. Haley, both of Yuma, Arizona. Authorized Capital stock: 60,000 shares of Class A common and 60,000 shares of Class B Common, both without nominal or par value, and 40,000 shares of preferred stock at $100.00 each. Provides for 7% annual dividends on preferred stock. Officers named in articles of incorporation: H. D. Sanders, President and Director; Philip Thorp, Vice-President and Director; S. I. Haley, Secretary-Treasurer and Director. Principal Business: To own and operate retail mercantile stores at such places as the company may deem proper, etc.

for the reason that appellants were not shown to have any connection or relation with said Piggly Wiggly Holding Corporation of Yuma, and that such document as to appellants was hearsay. (Assignment of error VI.)

12. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 6, a document which in full substance is as follows:

> Certificate of Amendment of Articles of In-

corporation of Piggly Wiggly Holding Corporation of Yuma, dated February 19, 1930, filed in the office of the Arizona Corporation Commission at the request of Wm. H. Westover of Yuma, Arizona, on February 24, 1930. Certificate signed by H. D. Sanders and S. I. Haley. The purpose of the certificate was to change the name of the corporation to "U-Save Holding Corporation."

for the reason that appellants were not shown to have any connection or relation with said Piggly Wiggly Holding Corporation of Yuma, and that such document as to appellants was hearsay. (Assignment of error VII) (VI.)

13. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 13, a document which in full substance is as follows:

Annual Report of U-Save Holding Corporation (formerly Piggly Wiggly Holding Corporation) at the close of business June 30, 1930, executed and sworn to in Yuma County, Arizona, by H. D. Sanders, as President, and S. Idelle Haley, as Secretary, July 22, 1930; filed in the office of the Arizona Corporation Commission July 23, 1930, at the request of Piggly Wiggly Yuma Co. shows:

Assets	$956,662.59
Liabilities	9,915.47
Accumulations	504,767.22
Amount of Capital Stock Paid up and Issued	337,070.00
Stock Contracts	104,910.00

Real Porperty Owned:

Situate—Yuma, Ariz.	42,927.21
San Diego, Cal.	1,300.00
Somerton, Ariz.	5,000.00
El Centro, Calif.	21,179.68

Personal Property—Situate:

Yuma, Arizona: Stock fixtures & merchandise	7,177.47
Warehouse equipment and merchandise	87,445.81
Piggly Wiggly stock	130,695.00
Imperial, California:	
Store: fixtures & merchandise	9,506.43

Officers, in addition to the President and Secretary, are given: Vice-Presidents, Philip H. Thorp and C. L. Patterson. The addresses of all officers are given as Yuma, Arizona, except Philip H. Thorp, whose address is given as San Bernardino, California.

for the reason that there was no connection shown between U-Save Holding Corporation and appellants, and for the further reason that appellants are not charged in the first count of the indictment with having had any connection with said corporation. (Assignment of error X.)

14. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 43, which is in words and figures as follows, to-wit:

"BOND AND MORTGAGE CORPORATION
Security Building
Phoenix, Arizona
April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.
Dear Madam:

Answering your letter of April 8th, we wish to advise that the Common stock of the United Clarence Saunders Stores, Inc., is being offered to the public through this company for $10.00 per share.

Trusting that this is the information you desire, we are,

Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. Loveland,
Assistant Secretary."

for the reason that there was no adequate proof that appellants mailed or caused to be mailed said letter, and for the further reason that there was no showing that appellants had devised or intended to devise a scheme or artifice to defraud or to obtain money by false pretenses, representations and promises, as alleged in the first count of the indictment. (Assignment of error XIV.)

15. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 53, a document which in full substance is as follows:

A mimeographed copy of letters to stockholders of United Clarence Saunders Stores, Inc.,

> dated September 29, 1930, mimeographed signature of A. E. Sanders, President, calling attention to stockholders meeting to be held November 1, 1930, for the purpose of changing the name to United Sanders Stores, Inc. Also states that under the present franchise agreement with Clarence Saunders they have to pay him ½ of 1% of the gross volume of business, which amounts to about $10,000.00 a year, and that under the new plan they will be able to increase their volume of business and save the stockholders this immense royalty by doing away with the Clarence Saunders franchise agreement. Attached to letter is a notice of special meeting to stockholders and blank proxy.

for the reason that such document was hearsay and not binding upon appellants. (Assignment of error XVII.)

16. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 54, a document headed "United Clarence Saunders Stores, Inc., 305 South Second Avenue, Phoenix, Arizona," and being a notice to stockholders, dated October 6, 1930, which is in full substance as follows:

> It states that the primary purpose of the meeting is to change the name of the company to United Sanders Stores, Inc., of Arizona, and to change the plans of the company in respect to operation and management of additional stores proposed to be established. It calls attention to the royalty payments to the Clarence Saunders Corporation mentioned in Exhibit 53. It states

> that the stores would be operated under the name of Sanders U-Save System and would control forty-two stores and five warehouses of four separate corporations, namely, United Clarence Saunders Stores, Inc., Piggly Wiggly Southwestern Company, Piggly Wiggly Yuma Company and U-Save Holding Corporation, all doing a business of over $3,000,000.0 annually and having assets of approximately $2,800,000.00. It gives the qualifications of Mr. H. D. Sanders, who will assume control of the Arizona unit, and his associates, K. C. Van Atta, A. M. Kaler, Warfield Ryley, Cy Measday, J. S. Mackin and A. E. Sanders. It states that a Re-Sales Department to handle the resale of the corporate securities will be established which will create an active market for the securities.

for the reason that said exhibit did not tend to connect appellants with the charge contained in the first count of the indictment and was not biding upon them, and was hearsay. (Assignment of error XVIII.)

17. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 56, being a mimeographed letter to stockholders of United Sanders Stores, Inc., dated January 15, 1931, signed by H. D. Sanders, President, and G. C. Partee, Secretary, which is in full substance as follows:

> It states that the company has expanded, has in operation twenty-six retail stores in Arizona, owns practically all of the stock of Piggly Wiggly Southwestern Company; that the year 1930 had

been a hard year; that most of the difficulties have been overcome; that the U-Save Holding Corporation has purchased the control of the common stock and is co-operating in the operation of the business which will be very beneficial to the stockholders. It predicts the reduction in expense, the opening of new stores and states that the company is in good financial position.

for the reason that appellants had no connection with said exhibit or the matters and things therein stated, and it was hearsay as to them. (Assignment of error XIX.)

18. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 64, which is a form letter from United Sanders Stores, Inc., dated January 10, 1931, addressed to the stockholders of the company, signed by G. C. Partee, Secretary, which exhibit is in full substance as follows:

It states the rapid progress made by the company; that on account of business depression it took a market loss on merchandise. It comments on the financial difficulties of Clarence Saunders Stores, Inc., at Memphis, Tennessee; that the failure affected all units operating under the concessions; that the company was required to change its set-up and its policy of expansion; that in October, 1930, the U-Save Holding Corporation purchased control of the common stock and since that time has been in active management of its affairs with the reduction in expenses of $50,000.00 per annum; that the U-Save Holding Corporation purchased the warehouse

stocks of the company at actual inventory and agreed to serve the company at cost, plus five per cent; that the warehouse inventoried at approximately $110,000.00 and that U-Save Holding Corporation issued in payment $60,100.00 in preferred stock and paid off $40,000.00 of current liabilities; that the deal was very advantageous to the stockholders of United Sanders Stores and concludes with a statement of assets and liabilities as follows:

Current Assets	$423,652.91
Fixed Assets	170,316.93
Net Outside Investments	87,685.10
Deferred Assets	74,076.47
Organization and Development	259,963.24
Concessions	151,000.00
Total Accounts Payable	63,491.17
Payroll	2,069.66
Notes	10,689.74
Debenture Bonds outstanding—	
Less in Treasury	83,900.00
Net Worth	939,944.06

for the reason that said exhibit was incompetent and not binding upon, or applicable to, appellants, and was pure hearsay as to them. (Assignment of error XX.)

19. The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

"You are instructed that on the question of the alleged scheme to obtain money or property by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent

> acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and specified in the indictment as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven."

which said instruction was duly excepted to upon the ground that the expression "substantial practices" was indefinite and undefined and tended to confuse the jury, and that the expression "within the lines of the charge" was indefinite, uncertain and tended to confuse the jury. (Assignment of error XXVII.)

20. The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

> "It is common knowledge that nothing is more alluring than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all."

to which said instruction appellants duly excepted upon the ground that the same was prejudicial, unnecessary and not justified by the record. (Assignment of error XXVIII.)

BRIEF OF ARGUMENT

I.

THE INDICTMENT UNDER REVIEW IS FATALLY DEFECTIVE BECAUSE (A) IT IS VAGUE, INDEFINITE, UNCERTAIN AND INCOMPLETE, AND (B) IT IS BAD FOR DUPLICITY, IN THAT IT CHARGES MORE THAN ONE SCHEME OR ARTICLE TO DEFRAUD AND CONSEQUENTLY MORE THAN ONE OFFENSE. (Specification of Error 1.)

A.

It is essential to the validity of any count of an indictment that it charge the offense definitely and completely. The indictment under review is vague, indefinite, uncertain and incomplete.

1. The indictment upon its face is in this respect defective for the following reasons:

> It charges the offense as committed prior to the various *dates* on which letters were mailed as alleged in the several counts of the indictment, demurrer to all of which, with the exception of the first count, was sustained, thus removing the points of reference and, if the subsequent counts be referred to, the time of the offense is left wholly indefinite and even carried beyond the date of the offense as charged in the first count (2).
>
> In charging the offense in parts and parcels it charges that the scheme was to obtain money by false pretenses from individuals in the sale of the stock and, also, that the *said scheme* contemplated and resulted in a wrongful control and

conversion of corporate property, the representations alleged as to one phase of the scheme having no bearing upon the other (3, 6, 7).

It charges all of the defendants with having devised an illegal scheme in all of its parts, and at the same time charges one of the defendants, together with persons unnamed, with another series of events inconsistent with the theory of the indictment (6).

The offense, as charged, consists of the mailing of the letter of April 9, 1930, but the indictment charges acts occurring thereafter as part of the same scheme (6).

2. An indictment which is vague, indefinite, uncertain and incomplete is insufficient upon which to charge defendants with the commission of an offense.

United States v. Britton, 108 U. S. 199, 204, 206; 27 L. Ed. 698;

Dalton v. United States (C. C. A. 7), 127 Fed. 544, 545;

Fontana v. United States (C. C. A. 8), 262 Fed. 283, 286, 287;

United States v. McConnell (D. C. Pa.), 285 Fed. 164, 166;

Lynch v. United States (C. C. A. 8), 10 Fed. (2d) 947, 948, 949;

Terry v. United States (C. C. A. 9), 7 Fed. (2d) 28, 30;

31 *Corpus Juris* 659.

B.

If, in a single count, an indictment charges more than one offense, it is guilty of duplicity and vulnerable to attack by demurrer. The first and only count of the indictment under review charges the defendants with the commission of more than one offense. 1. The indictment charges more than a single offense, in that:

> It alleges that defendants devised a scheme to obtain money and property by false pretenses from individuals in connection with the sale of stock and debentures of the corporation and, also, charges that one of the defendants, H. D. Sanders, and his associates who are unnamed, through U-Save Holding Corporation acquired control of the corporation under consideration, took charge of its assets and wrongfully removed its merchandise from the State of Arizona, thus alleging separate schemes operative against different classes and devised and executed by different parties (6).

> The subsequent counts of the indictment, 10 to 13 inclusive, charge separate uses of the mails in furtherance of the H. D. Sanders' transactions, thus evidencing the intent to make these events the basis of separate charges.

> Count 10 of the indictment, Transcript of Record 42;

> Count 11 of the indictment, Transcript of Record 44;

> Count 12 of the indictment, Transcript of Record 50, 56;

Count 13 of the indictment, Transcript of Record 56, 65.

2. A single count of an indictment charging more than one offense is guilty of duplicity and hence fatally defective.

Revised Statutes of the United States, Section 1024; U. S. C. A. Title 18, Section 557;

McElroy v. United States, 164 U. S. 76, 77, 80; 41 L. Ed. 355;

De Luca v. United States (C. C. A. 2), 299 Fed. 741, 743, 745;

McLendon v. United States (C. C. A. 6), 2 Fed. (2d), 660, 661;

Beaux Arts Dresses v. United States (C. C. A. 2), 9 Fed. (2d), 531, 533;

Creel v. United States (C. C. A. 8), 21 Fed. (2d), 690, 691;

Lemon v. United States (C. C. A. 8), 164 Fed. 953, 958;

United States v. Smith (D. C. W. D. Ky.), 152 Fed. 542, 545;

Coco v. United States (C. C. A. 8), 289 Fed. 33, 34, 35;

Pointer v. United States, 151 U. S. 396, 401, 402; 38 L. Ed. 208;

United States v. Morse (C. C. S. D. N. Y.), 161 Fed. 429, 437;

United States v. Morris (C. C. D. Ore.), 18 Fed. 900, 903;

United States v. Hopkins (D. C. S. D. Fla.), 290 Fed. 619, 620, 621.

3. Language of an indictment descriptive of the offense and constituting a charging part thereof cannot be regarded as surplusage.

Exparte Bain, 121 U. S. 1, 13; 30 Ed. 849; *Stewart v. United States* (C. C. A. 9), 12 Fed. (2d), 524, 525;

United States v. Wills (C. C. A. 3), 36 Fed. (2d), 855, 858.

II.

THE FINANCIAL STATEMENTS PREPARED BY L. D. NULL, GOVERNMENT'S EXHIBITS 89, 90 AND 91, WERE ERRONEOUSLY ADMITTED IN EVIDENCE. (Specifications of Error 4, 5 and 6.)

A.

POINTS OF FACT APPLICABLE TO THESE EXHIBITS

1. Appellants had no control over, connection with, or knowledge of, the books and records of the company upon which these exhibits were based (332, 334, 348).

2. All of the supporting records were not identified and the basic sources were not even present in court (252, 363, 365).

3. Such of the books as were in court were themselves but summaries and would not establish the ultimate correctness of these exhibits (360, 364, 369, 370, 373).

4. Those of the books as were present during the

trial were not properly identified and not identified at all for an important period of the corporation's existence (251).

5. The books of the company were shown to be incorrect and to have been kept under the supervision of the same man who falsified them, who was the most important witness upon the subject of identification (255, 417-419).

6. None of the books and records from which these exhibits were compiled were offered or introduced in evidence.

7. No reasonable opportunity was given to appellants adequately to examine and verify the exhibits or to prepare for the cross-examination of the accountants (360, 361, 430).

8. As to Exhibit 91, it purported to show a general or average condition for the nine months' period ending September 30, 1930, in attempted proof of conditions existing on and prior to April 9, 1930, the date alleged as the commission of the offense (378).

B.

POINTS OF LAW APPLICABLE TO EXHIBITS 89, 90 and 91

1. Before expert statements are admissable, sufficient evidence must first be given demonstrating the admissibility of the books and records which the statement purports to summarize.

> *Phillips v. United States* (C. C. A. 8), 201 Fed. 259, 269.

2. Books of account of a third party are inadmissible and constitute hearsay unless the evidence discloses that the party against whom they are offered has some responsibility for, connection with, and knowledge of, them. And even in such case the foundation must be laid showing that the books in question are kept in the regular course of the business; that the entries are either original or the first permanent entries of the transactions they purport to reflect; that they were made at the time or within reasonable proximity to the time of the respective transactions and that the person making them had personal knowledge or obtained such knowledge of the events recorded from a report regularly made to him by some other person employed in the business whose duty it is to make the entries in the regular course of his employment.

Osborne v. United States (C. C. A. 9), 17 Fed. (2d), 246, 247, 248, 249;

Phillips v. United States (C. C. A. 8), 201 Fed. 259, 269;

Chan Kiu Sing v. Gordon, 171 Cal. 28; 151 Pac. 657;

Chaffee & Co. v. United States, 18 Wall. 516; 21 L. Ed. 908, 912;

Hagen Coal Mines, Inc. v. New State Coal Co., et al., (C. C. A. 8), 30 Fed. (2d), 92, 93;

Beck v. United States (C. C. A. 8), 33 Fed. (2d), 107, 113;

Kaplan v. United States, (C. C. A. 2), 229 Fed. 389, 390;

Pabst Brewing Co., v. V. E. Clemens Horst Co. (C.C.A. 9), 229 Fed. 913,918;

Worden v. United States (C. C. A. 6), 204 Fed. 1, 6, 8;

Norcott v. United States (C. C. A. 7), 65 Fed. (2d), 913, 916;

Singer v. United States (C. C. A. 3), 58 Fed. (2d), 74, 76;

McDonald v. United States (C. C. A. 6), 241 Fed. 793, 800;

People v. Mitchell (Cal. 1892), 29 Pac. 1106, 1107;

Wade v. State (Tex. 1896), 35 S. W. 663;
State v. McFalin (Nev. 1918), 172 Pac. 371, 372;

Tipps v. Landers (Cal. 1920), 190 Pac. 173, 174, 175.

3. The cases sometimes cited in alleged departure from the rules announced by the foregoing decisions contain important distinguishing factors and are not truly divergent in principle. For example see:

Barrett v. United States (C. C. A. 8), 33 Fed. (2d), 115;

Stephens v. United States (C. C. A. 9), 41 Fed. (2d), 440, 444, 445;

Butler v. United States (C. C. A. 10), 53 Fed. (2d), 800, 805;

Krotkiewicz v. United States (C. C. A. 6), 19 Fed. (2d), 421, 425, 426.

4. Exhibit 91, which purports to show general or average financial condition on September 30, 1930,

six months after the date of the alleged offense, is inadmissible because of absolute irrelevancy.

Mandelbaum v. Goodyear Tire & Rubber Co., (C. C. A. 8), 6 Fed. (2d), 818, 824;

Gold v. United States (C. C. A. 8), 36 Fed. (2d), 16, 33;

State v. Mobley (Okl. 1925), 241 Pac. 155, 157;

Brenan v. Eubank (Tex. 1933), 56 S. W. (2d), 513, 515;

California Credit etc. Corp. v. Bernardini (Cal. 1926), 246 Pac. 824, 825;

Ellis v. State (Wis. 1909), 119 N. W. 1110, 1114;

Rardon v. Davis (Mo. 1932), 52 S. W. (2d), 193, 195;

Davidter v. Ash (Neb. 1933), 249 N. W. 886.

III.

GOVERNMENT'S EXHIBITS 109 AND 110, BEING INCOMPLETE MEMORANDUM CARDS KEPT IN THE OFFICE OF THE COLLECTOR OF INTERNAL REVENUE FOR ARIZONA, PURPORTING TO CONTAIN CERTAIN FIGURES OR SUMS COPIED FROM THE ORIGINAL RETURNS OF THE CORPORATION, WERE ERRONEOUSLY ADMITTED IN EVIDENCE. (Specifications of Error 7, 8.)

A.

POINTS OF FACT APPLICABLE TO THESE EXHIBITS

1. The memorandum cards themselves are on their

faces incomplete, showing only copies of certain totals without any of the supporting data from the original returns (442, 446).

2. The Collector of Internal Revenue, Mr. Davidson, admitted that he knew nothing about the entries on the exhibits, whether they were true or correct, whether they had been correctly copied from the original returns or who signed such returns (439).
3. The record is silent as to any effort to produce either the original returns or certified or authenticated copies which were available under statute and regulations.

B.

POINTS OF LAW APPLICABLE TO THESE EXHIBITS

1. Even were these exhibits not hearsay as to appellants and were binding upon them, the only method recognized by law of using income tax information, where such use is permissible, is by the introduction of the original or a copy properly certified or authenticated, any other attempted proof in such connection being violative of the best evidence rule.

> *Corliss v. United States* (C. C. A. 8), 7 Fed. (2d), 455, 457.

2. Copies of the original returns properly certified or authenticated were obtainable and any attempted proof by other means is inadmissible.

> *Revised Statutes of the United States*, Section 882; U. S. C. A. Title 28, Section 661;
>
> *Regulation 74 of the Treasury Department*, Section 55, Art. 422;

Gibson v. United States (C. C. A. 9), 31 Fed. (2d), 19, 22;

In re Epstein (D. C. Mich. 1924), 300 Fed. 407, 408, affirmed In re Epstein (C. C. A. 6), 4 Fed. (2d), 529, 530;

Lewis v. United States (C. C. A. 9), 38 Fed. (2d), 406, 413;

Mohawk Condensed Milk Co. v. United States (C. C. 1930) 48 Fed. (2d), 682, 685.

IV.

APPELANTS' CROSS-EXAMINATION OF TOM H. BRANDT WAS UNDULTY RESTRICTED AND THEY WERE ERRONEOUSLY PREVENTED FROM DEMONSTRATING, BY THE INTRODUCTION OF EVIDENCE, THE INCREDIBILITY OF THE TESTIMONY OF THIS WITNESS, WHOSE IDENTIFICATION OF BOOKS AND RECORDS, AND WHOSE TESTIMONY OTHERWISE, WAS ESSENTIAL TO THE GOVERNMENT'S CASE (Specification of Error 9, 10).

A.

POINTS OF FACT APPLICABLE TO BRANDT'S CROSS-EXAMINATION.

1. Brandt was the most indispensable government witness (251, 261, 267, 324, 391, 411).

2. He identified the books of account of the corporation, present in court, for the important period commencing September 15, 1929, and ending August 7, 1930, and stated that they were true and correct (252, 253).

3. His testimony on the trial was inconsistent with

certain government exhibits previously prepared or approved by him in the course of his employment by the comapny.

> Compare testimony, Transcript of Record 330-339 with Government's Exhibit 40, Transcript of Record 333, 335.
>
> Compare testimony, Transcript of Record 330, with Government's Exhibit 22, Transcript of Record 248, 249, 250.

4. Brandt admitted making one important, fictitious entry (418).

5. He denied that any portion of a $5,000 withdrawal of company funds was appropriated for his own personal use (416, 417, 418).

6. Appellants offered to prove by their avowal that if permitted to cross-examnne Brandt he would testify that he was personally resopnsible for the shortage of $5,000, that he had embezzled the same and that $2,500 or $3,000 thereof had been actually appropriated to his own use and that many of the books of the company were kept in his own home for the purpose of concealing transactions (425).

7. Appellants offered in evidence the signed confession of this witness and checks showing misappropriation of funds to his own use (419, 422, 423).

B.
THE LAW APPLICABLE TO BRANDT'S CROSS-EXAMINATION

1. Reasonable latitude in the cross-examination of a witness is a matter of absolute right, one of its purposes being to bring out facts tending to discredit

him by showing that his testimony in chief was untrue or biased and that he is not entitled to belief, and a denial of this right is prejudicial error.

Alford v. United States, 282 U. S. 687, 691; 75 L. Ed., 624;

Cossack v. United States (C. C. A. 9), 63 Fed. (2d), 511, 516, 517;

Heard v. United States (C. C. A. 8), 255 Fed. 829, 832.

V.

THE GOVERNMENT FAILED TO PROVE BY ANY COMPETENT EVIDENCE WHATSOEVER CERTAIN MATERIAL ALLEGATIONS OF THE INDICTMENT, AND FOR THIS ADDITIONAL REASON ERRED IN OVERRULING APPELANTS' MOTIONS FOR DIRECTED VERDICT

(Specifications of Error, 2, 3, 14).

1. There was no identfication of the signature of M. Loveland to government's Exhibit 43, the mailing of which is pleaded in the indictment as the offense charged (13).

2. The government's evidence disclosed that in the important events touching the organization and capitalization of the company appellants did not participate (345, 346).

3. The government's evidence discloses that appellants did not participate in the acquisition of the Saunders franchise or in the issuance of stock to A. E. Sanders in consideration of the transfer thereof (349).

4. A. E. Sanders, the Government's witness, contradicted himself as to appellants' participation at the inception of the enterprise (345, 352).

5. The proof as to the issuance of 35,000 shares charged in the indictment was directly contradicted by the government's evidence (356).

6. The evidence shows a disassociation, rather than an association, between appellants and A. E. Sanders and between appellants and H. D. Sanders (349, 350, 351, 352, 355, 357, 358).

7. No evidence was introduced as to the payment of a dividend on June 29, 1929, the proof of a June payment a year later not being charged.

8. The evidence of the government disclosed that appellants had not connection with the H. D. Sanders' events or the U-Save Holding Corporation transactions and no contact with the letters written in connection therewith, all of which, however, were introduced against appellants who were the only defendants standing trial.

Exhibit 52, Transcript of of Record, 279.
Exhibit 53, Transcript of Record, 280.
Exhibit 54, Transcript of Record, 281.
Exhibit 56, Transcript of Record, 289.
Exhibit 64, Transcript of Record, 297.
See also Transcript of Record 212, 213, 214, 219.

9. There was no evidence as to the removal of $100,000.00 of merchandise as against any defendant.

10. The proof showed that the letter charged as constituting the offense was not mailed for the pur-

pose of executing the scheme to defraud because the recipient thereof, Mrs. Addie Driscoll, had already purchased certain shares of stock and bought no more thereafter (293).

VI.

THE GOVERNMENT ATTEMPTED, BY THE INTRODUCTION OF EVIDENCE, TO PROVE TWO DISTINCT SCHEMES TO DEFRAUD, IN ONE OF WHICH, IT WAS AFFIRMATIVELY SHOWN, APPELLANTS HAD NO CONNECTION WHATSOEVER. PROOF OF TWO OR MORE SCHEMES ALLEGED AS ILLEGAL ENTERPRISES IS NOT PERMISSIBLE UNDER ONE COUNT OF AN INDICTMENT (Specifications of Error 3, 11, 12, 13, 15, 16, 17, 18).

1. Proof of letters mailed, reports to stockholders, incorporation proceedings and annual report to the state, all appertaining to H. D. Sanders and his U-Save Holding Corporation activities, were introduced.

2. Evidence tending to establish two or more schemes alleged as illegal enterprises, which do not converge to a common end, is not permissible under one count of an indictment.

Terry v. United States (C. C. A. 9), 7 Fed. (2d), 28, 30;

McElroy v. United States, 164 U. S. 76, 77, 80; 41 L. Ed. 355;

De Luca v. United States (C. C. A. 2), 299 Fed. 741, 745;

Tinsley v. United States (C. C. A. 8), 43 Fed. (2d), 890, 893;

Coco v. United States (C. C. A. 8), 289 Fed. Fed 33, 35;

Wyatt v. United States (C. C. A. 3), 23 Fed. (2d), 791, 792;

Marcante v. United States (C. C. A. 10), 49 Fed. (2d), 156, 157;

United States v. Siebrecht (C. C. A. 2), 59 Fed. (2d), 976, 977, 978;

Beaux Arts Dresses v. United States (C. C. A. 2), 9 Fed. (2d), 531, 533;

Nazzaro v. United States (C. C. A. 10), 56 Fed. (2d), 1026, 1028.

VII.

INSTEAD OF PROVING THE OFFENSE AS LAID IN THE INDICTMENT, BEYOND A REASONABLE DOUBT, THE EVIDENCE AFFIRMATIVELY DISCLOSED THAT THERE WAS NO COMBINATION IN UNLAWFUL INTENT OR ACTIVITY ON THE PART OF THE DEFENDANTS (Specification of Error 3).

1. A. E. Sanders, as a Government witness, testified that there was no unlawful intent (354).

2. As a result of appellants' efforts, between $800,000.00 and $900,000.00 actually went into the treasury of the corporation as fresh capital (349).

3. The payment of the commissions was expressly allowed by the corporation commission and the sale of the shares to A. E. Sanders, issued by express permission of the Corporation Commission, was not restricted (222).

4. These shares were not transferred to appellants by Sanders immediately but only intermittently upon fulfillment of a schedule of performance in the sale of company shares (405).

5. The allegation of the indictment with respect to the 35,000 share block failed of proof (356).

6. The company did make substantial progress (223, 229, 230, 232, 233, 235, 236, 287).

7. The causes which contributed to the failure of the enterprise were not attributable to appellants.

(a) A. E. Sanders was absent upon another project during the critical period of the corporation's existence (330, 352).

(b) Unwise purchases were made resulting in heavy inventory loss (353).

(c) The company was heedlessly committed to the assumption of obligations, having no relation to its business and contrary to its welfare (247).

(d) When H. D. Sanders intervened the control of the company passed into his hands and its books and assets removed from the State (260).

(e) Brandt, the chief witness for the Government, had himself secretly abstracted $5000.00 of company funds (417).

VIII.

THE COURT ERRED IN GIVING TO THE JURY THE FOLLOWING INSTRUCTION (Specification of Error 19):

> "You are instructed that on the question of the alleged scheme to obtain money or property

by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and specified in the indictment as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven."

A.

The instruction submitted to the jury, in determining the guilt or innocence of appellants, allegations of the indictment and evidence of events with which appellants had no connection.

Transcript of Record 350;
Transcript of Record 279, 280, 281, 289, 211, 212, 213, 214.

B.

The instruction is vague, ambiguous and misleading and erroneously referred the jury to the indictment in determining the issues.

Baltimore & Ohio R. Co. v. Lockwood, 72 Ohio State, 586, 590; 74 N. E. 1071, 1072;

Director General v. Pence's Administratrix (Va. 1923), 116 S. E. 351, 357;

Laughlin v. Hopkinson, 292 Ill. 82, 84;

Lerette v. Director General, 306 Ill. 348, 354;

Krieger v. A. E. & C. R. R. Co. 242 Ill. 544, 548;

Mulroney Mfg. Co. v. Weeks (Ia. 1919), 171 N. W. 36, 37;

Arkansas Fuel Oil Co. v. Connellee (Tex. 1931), 39 S. W. (2d) 99, 101;

Gorman v. St. Louis Merchants' Bridge Terminal Ry. Co. (Mo. 1930), 28 S. W. (2d) 1023, 1025;

Mack v. State (Fla. 1917), 74 So. 522, 534;

Lombard-Hart Loan Co. v. Smiley, (Okla. 1925), 242 Pac. 212, 213;

Hines v. Gale, (Ariz. 1923), 213 Pac. 395, 399.

IX.

THE COURT ERRED IN GIVING TO THE JURY THE FOLLOWING INSTRUCTION (Specification of Error 20):

> "It is common knowledge that nothing is more alluring than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all."

In instructing the jury as to what is common knowledge and in the use of inapt and prejudicial illustrations, the instruction constitutes prejudicial error.

Woodward Iron Co. v. Sheehan (Ala. 1910), 52 So. 24, 26;

Neel, et al. v. Powell (Ga. 1908), 61 S. E. 729, 731.

ARGUMENT

Foreword

The consideration of this appeal involves both an analysis of the indictment and a close study of the facts particularly with reference to the attempt on the part of the government to establish the alleged falsity of the representations. So obviously erroneous was the admission in evidence of the financial statements or summaries (Exhibits 89, 90 and 91) and the income tax memorandum cards (Exhibits 109 and 110), that the discussion of these subjects in the ensuing argument will immediately follow the presentation of the points upon the indictment, since, it is believed, the consideration of the facts and law touching these exhibits will render unnecessary any elaborate study of the other points, well founded, it is submitted, as they also are, both from a legal and factual standpoint.

I.

THE INDICTMENT UNDER REVIEW IS FATALLY DEFECTIVE BECAUSE (a) IT IS VAGUE, INDEFINITE, UNCERTAIN AND INCOMPLETE, AND (b) IT IS BAD FOR DUPLICITY, IN THAT IT CHARGES MORE THAN ONE SCSHEME OR ARTIFICE TO DEFRAUD AND, CONSEQUENTLY MORE THAN ONE OFFENSE (Specification of Error 1).

VAGUENESS AND UNCERTAINTY

It is axiomatic that an indictment, more than the pleading of any other criminal or civil claim, must clearly, exactly, completely and unambiguously set forth the offense charged. The section under which appellants were prosecuted is referred to in the in-

dictment and generally known as the provision respecting the "Use of the United States Mails in Furtherance of a Scheme to Defraud." Referring to a prosecution under Section 215 of the Criminal Code, one court aptly said that the use of the mails was the *gist* of the offense and the scheme to defraud the *genesis*. At the threshold of the inquiry the question immediately arises, what is the scheme or artifice charged as constituting a criminal enterprise?

The indictment itself, in its opening paragraph, designates the offense intended to be pleaded by charging that the defendants "did devise and intended to devise a scheme and artifice to defraud *and* to obtain money and property by means of false and fraudulent pretenses," against certain named individuals, and from a number of other persons, including the public generally, whose names are unknown. Leaving out of consideration, for the moment, the question as to whether or not the pleading of a scheme to defraud *and* to obtain money by false pretenses contemplates two schemes or artifices, it is certain that the indictment does allege a scheme to defraud by means of false pretenses, for the purpose of obtaining money from individuals both named and unknown. This constitutes the promise of the government of what it will plead in the ensuing paragraphs of the indictment and of what it will prove on the trial and is the test to which the subsequent allegations must be submitted.

The vague, uncertain and defective character of the indictment is quickly apparent when an attempt is made to fit the allegations of the first count into the plan or pattern of a case in which the offense is described as a scheme to obtain money or property by false pretenses. It is obvious that the first count

was drawn in contemplation of the continued existence of the ensuing sixteen counts and, in addition to describing the offense in parts and parcels, it is evident that the pleader intended the first count to be a part and parcel of a charge embracing seventeen separate counts in their totality. The successful demurrer to the last sixteen counts leaves the first standing alone without the expected support of its fellows, and, alone, it presents a peculiar legal spectacle.

As a part of the first count, indeed in the first words thereof, the Grand Jurors charge that the scheme was devised "prior to the *dates* on which the letters were mailed as hereinafter alleged in the *several counts of this indictment.*" (2) The use of the plural word "dates" and the reference to the several counts of the indictment permits the proof of the offense to roam freely over the calendar.

As has been said, the elimination of the last sixteen counts removed them from consideration as points of reference and it would be no answer to contend that such letters are admissable for the purpose of demonstrating intent because, in this connection, we are considering the government's description of the offense, which, under the first count of the indictment, was completed by the mailing of the letter to Addie Driscoll on April 9, 1930 (Government's Exhibit 43, Transcript 13).

This condition of the pleading, in the very opening paragraph, finds the government pinioned on either of two horns of a dilemma. If it be not permitted to use the letters and documents, with their several dates, charged as separate offenses in the ensuing counts, for the purpose of reference in fixing the time

of the devising of the scheme charged in the first count, then this element of the offense is left a virtual blank, making the pleader say, in effect, "prior to the dates hereinafter alleged a scheme was devised," and then failing to allege any date whatsoever. If, on the other hand, the government be permitted to use the dates of the letters and documents in the last sixteen counts of the indictment, for the purpose of reference in fixing the *times* when the scheme was devised and intended to be devised, then a situation wholly insupportable is presented.

The offense charged in the first count of the indictment is the devising of a scheme to defraud and the mailing of a letter in furtherance thereof on April 9, 1930. On that date, therefore, the act, which the government contends rendered the defendants guilty, was done and on that date the offense must be regarded as completed. The two elements of the charge, the devising of the scheme and the mailing of the letter, the *genesis* and the *gist* of the offense, combined to render the defendants amenable to trial for the alleged violation of Section 215 of the Criminal Code. But, the indictment charges, the dates on which the scheme was devised, and for which the defendants are prosecuted, extended from November 23, 1928 (the date of the incorporation of Clarence Saunders Stores, Inc. (3),) and on various dates thereafter, to February 19, 1931 (a letter mentioned in the tenth count of the indictment appearing in the Transcript at page 42). Defendants are confronted, therefore, with the claim that they devised a single scheme on various dates *as late as February 19, 1931* (42), and that in furtherance *of that scheme* they mailed a letter on April 9, 1930, ten months before the final fruition of the scheme charged as devised and intended to be devised during a period covering some twenty-seven

months. Even under the most relaxed rules of civil pleading a defendant could not be brought to trial confronted with a claim so alleged.

After announcing that the enterprise complained of was a scheme to obtain money by false pretenses, the indictment, after several intervening paragraphs, charges that it was further a part of said scheme, "and in furtherance thereof," for the purpose of inducing the persons to be defrauded to part with their money and property in the purchase of stock and debentures of the corporation, that the defendants would and did make false representations to the persons to be defrauded by means of conversations, letters, financial statements, etc. Then follows the series of fourteen numbered pragraphs describing the representations (8). In the intervening paragraphs, however, appear allegations to the effect that the defendant, H. D. Sanders, and his associates, organized a corporation which finally came to be known as U-Save Holding Corporation, which acquired the majority of the common stock of United Sanders Stores, Inc., and, after proceeding to take charge of its assets, removed merchandise valued at more than $100,000 from the warehouses of the company in Arizona to California without making proper accounting (6). This alleged event will be more particularly considered in connection with appellants' contention that the indictment at bar is bad for duplicity, but, in addition thereto, it is apparent that the various representations alleged as being false have, and could have, no bearing upon the acquisition of the capital stock of the company or the wrongful removal of its merchandise by H. D. Sanders and his associates. While such a transaction might have been wrongful or even criminal, by its very nature it could play no part in the alleged false representations made to the various in-

dividuals for the purpose of inducing them to part with their money and property. This element of the offense, if offense it be, was committed against the corporation. The charge, it must be remembered, is that the representations were made for the purpose of inducing *various persons to part with their money in the purchase of stock and debentures* (7).

The indictment is uncertain and insufficient, moreover, in that it charges all of the defandants, including appellants and A. E. Sanders and H. D. Sanders, with having devised an illegal scheme in all of its parts, and at the same time charges one of the defendants, H. D. Sanders, together with his individual associates whose names are unknown, with another series of events utterly incongruous with the theme of the indictment. Here, again, the court's attention is respectifully directed to the organization of the U-Save Holding Corporation on February 24, 1930, the acquisition by it of the capital stock of the corporation under consideration and the wrongful removal of the property from Arizona to California (6).

In attempting to charge the crime in a series of disjointed parts, some pertinent and some wholly inapplicable, some charged as both a part of the scheme and as acts in furtherance thereof, the government presents a jig-saw puzzle to the defendants and requests them and the court to try to fit the pieces in their proper places. The trouble with the indictment at bar, however, is that the pieces do not fit.

In *United States v. Britton*, 108 U. S. 199; 27 L. Ed. 698, the court, in passing upon the sufficiency of an indictment charging conspiracy against officers and directors of a national bank to misapply funds, said at page 204:

> "The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be s u f f i c i e n t l y charged; and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

Speaking further, the court said, at page 206:

> "The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely: by procuring to be declared by the Association a dividend when there were no net profits to pay it."

The court concluded that the indictment was fatally defective.

While, in the instant case, a technical conspiracy is perhaps not charged, nevertheless, a scheme or artifice to defraud is charged resembling, in many of its aspects, a conspiracy, which the venerable Judge Holmes termed "a partnership in criminal purposes" (218 U. S. 601). It follows, consequently, that the

various averments of what the defendants did in furtherance of the scheme do not aid any insufficiency in the indictment in charging the scheme as designed and intended by the defendants. Section 215 applies, it has been held, even though the defendants *only intentionally designed* the unlawful plan and did nothing further in effecting its object than to make a single use of the United States mails.

In *Dalton v. United States* (C. C. A. 7), 127 Fed. 544, the defendants were indicted for using the mails for the purpose of effecting a fraud. Quoting from *United States v. Hess*, 124 U. S. 483, 486; 31 L. Ed. 506, the court, in reversing the judgment of conviction and holding the indictment bad, said at page 545:

> " 'As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial. The averment here is that the defandant, "having devised a scheme to defraud divers other persons to the jurors unknown," intended to effect the same by inciting such other persons to communicate with him through the postoffice, and received a letter on the subject. Assuming that this averment of "having devised" the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken. . . . Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a

statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124, U. S. 483, 486, 487, 8 Sup. Ct. 571, 573; 31 L. Ed. 516.

So, also, in *Pettibone v. United States*, 148 U. S. 197, 202, 13 Sup. Ct., 542, 545, 37 L. Ed. 419, it is said:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital. *United States v. Hess*, 124 U. S. 483, 486 (8 Sup. Ct. 571; 31 L. Ed. 516). And in *United States v. Britton*, 108 U. S. 199 (2 Sup. Ct. 531, 27 L. Ed. 698), it was held in an indictment for conspiracy under Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

So, also, in *Blitz v. United States*, 153 U. S. 308, 315, 14 Sup. Ct. 924, 927, 38 L. Ed. 725, it is said:

"The general rule that an indictment for an offense purely statutory is sufficient, if it pursues substantially the words of the statute, is subject to the qualification, fundamental in the law of criminal procedure, 'that the accused must

be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offence.' *United States v. Simmons*, 96 U. S. 360, 362 (24 L. Ed. 819); *United States v. Hess*, 124 U. S. 483, 488 (8 Sup. Ct. 571, 31 L. Ed. 516). As said in *United States v. Carll*, 105 U. S. 611, 612 (26 L. Ed. 1135), it is not sufficient to set forth the offense in the words of the statute, 'unless those words of themselves fully, directly and expressly, without any uncertaintly or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished'."

Summing up the rule in a line, the court said at page 547:

> "Every particular of the scheme must be directly and positively averred."

In *Fontana v. United States* (C. C. A. 8), 262 Fed. 283, the defendant was convicted for the violation of the Espionage Act of June 15, 1917. In reversing the case and directing the defendant's discharge, the court first laid down the fundamental principle as to the requirement of certainty, saying, at page 286:

> "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportu-

nity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

Then, speaking of the nine allegations of false statements by the defendant, the court said, at page 286:

"If the pleader had set forth in this indictment any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged he might have been able to investigate the basis of the charges, to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was was passed on June 15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally

> failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial."

Speaking further, the court said, at page 287:

> "Nor were the charges in this indictment so certain and specific that upon conviction or acquittal thereon it or the judgment upon it constitute a complete offense to a second prosecution of the defendant for the same offense. In determining this question the evidence on the trial may not be, and the indictment and the judgment alone can be, considered, because the evidence does not become a part of the judgment, and as the indictment states no facts from which the time, places, or occasions on which the respective statements therein were alleged to have been made can be identified, the indictment and judgment failed to identify the charges so that another prosecution therefor would be barred thereby."

The indictment in the present case charges, as did the indictment in the Fontana case, fourteen instances of alleged misrepresentation without indicating the time at which such representations were made other than the announcement in the opening paragraph that the scheme was devised prior to the various dates alleged in the seventeen counts, which, as has been said, ran from August 29, 1929 (73), to February 19, 1931, including many intervening points of time. The letters pleaded in the succeeding counts are not, it must be noted, alleged as themselves constituting the false representations charged in the

first count. Paraphrasing the language of the *Fontana* case, 'the defendants might have been called upon to meet, on each of the fourteen charges, testimony that at any time of day or night before the indictment was filed the defendants or any of them had made to any one whomsoever, any of the statements charged in the indictment.' ...

The case at bar goes even further than any case examined because, while the defendants are charged with an offense committed and completed on April 9, 1930, they are also charged with the devising of a scheme in furtherance of which said letter was sent prior to April 25, 1930 (16), prior to January 31, 1931 (19), prior to July 1, 1930 (22), prior to April 3, 1930 (25), prior to March 26, 1930 (33), prior to July 22, 1930 (36), prior to May 9, 1930, (39), prior to February 19, 1931 (42), prior to January 25, 1931 (46), prior to January 10, 1931 (52), prior to October 6, 1930 (58), prior to September 16, 1930 (67), prior to August 12, 1930 (71), prior to August 29, 1929 (73), prior to July 21, 1930 (77). Such latitude was never intended by the farthest reaches of leniency.

In *United States v. McConnell* (D. C. Pa.) 285 Fed 164, the indictment charged a conspiracy to defraud the United States by the unlawful issuance of permits to purchase liquor. While the court sustained the particular indictment under consideration, it said at page 166:

> "While, under Section 1024, R. S. (Comp. St. Sec. 1690), it is allowable to join in one indictment several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or

> more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, there is no authority under the law for joining in one indictment, even in separate counts, such charges against different persons, and, where they are against the same persons, each charge must be set out in a different count. * * * If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

Nothing could be more certain than that the injection into the indictment of the H. D. Sanders' events, in which he and his associates participated, is a transaction irrelevant to the underlying theory of the indictment and causes the reader to pause and wonder for just what scheme the defendants were indicted.

In *Lynch v. United States* (C. C. A. 8), 10 Fed. (2d) 947, the defendant was indicted for possessing liquor in Indian country. The indictment charged "that heretofore, on to-wit, on or about the 7th day of December, 1922," the defendant did knowingly have in his possession certain intoxicating liquors. The court, in holding that the indictment was insufficiently specific, said at page 948:

> "This court has many times stated the fact essentials of a valid indictment. In *Miller et al. v. United States*, 133 F. 337, 341, 66 C. C. A.

399, 403, it said: 'It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction'."

Speaking further, the court said, at page 949:

> "Does it set forth the facts, which the pleader claimed constituted the offense in this case, so distinctly as to apprise the defendant of the charge he had to meet, and so completely as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense?"

Answering the question so propounded, the court said, in part, at page 949:

> "Where one is indicted for a serious offense, the legal presumption is that he is not guilty: that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts that the prosecutor thinks make him guilty, and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment

clearly discloses the earmarks, the circumstances and facts surrounding the case of the alleged offense, so that the defendant can identify, procure witnesses and make defense to it."

In *Terry v. United States* (C. C. A. 9), 7 Fed. (2d) 28, the defendants were convicted of conspiracy to violate the National Prohibition Act. In passing upon the indictment the court said at page 30:

> " 'If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment.' *United States v. McConnell* (D. C. 285 F. 164."

The general rule is summarized in 31 *Corpus Juris* 659, as follows:

> "An indictment, information, or complaint must be positive in respect to the charge that the person accused committed the crime which henders him amenable to the charge, and must directly and positively allege every fact necessary to constitute the crime. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, or as based on suspicion; the offense cannot be charged on information and belief, nor can the averments be aided by imagination or presumption."

DUPLICITY AND MULTIFARIOUSNESS

In addition to its vague and uncertain character, the indictment is defective from an even more serious standpoint. It may be taken as fundamental that where the charge, in a single count, embraces allegations demonstrating two or more distinct offenses it is bad for duplicity. As has been said, the keynote of the first count of the indictment under consideration is sounded in the words the "defendants * * * did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth, from W. H. Forman (and others named) and from a large number of other persons, including the public generally whose names because of their great number and want of information on the part of the Grand Jurors are not given herein, all of which persons are hereinafter called 'the persons to be defrauded'." This pronouncement, like the title to a Legislative Act, prescribes the limitations of the ensuing allegations.

This designation of the offense by the pleader may be separated into the following elements:

1. The defendants devised a scheme to defraud and to obtain money and property.
2. The means by which such money and property were to be obtained consisted of false and fraudulent pretenses.
3. The scheme is designed as operative upon certain named individuals and others who are called "the persons to be defrauded."

If these three elements of the offense be placed in what may be termed a "frame of reference" and the

remaining allegations of the indictment examined, only the consistent assertions of fact will smoothly fit into the frame, while every inconsistent averment which does not match the pattern will exclude itself.

Therefore, if, in attempting to charge a scheme to defraud various individuals by making false representations to them to induce them to purchase stock and debentures, the indictment also charges a scheme on the part of one of the defendants and his associates (not his co-defendants) to defraud the corporation and its stockholders, against whom the device originally alleged had already operated, it follows with mathematical inevitability that the indictment charges more than one offense.

In short, the scheme must possess as its inherent and necessary vice, false pretenses and promises. This, as has been said, is the Government's own announced and basic undertaking.

It is acknowledged, of course, that a criminal enterprise, like a lawful enterprise, may change and develop with time and circumstances; that many acts may combine to constitute one crime in a general plan or scheme when they are alleged as connected with the same transaction; that to aver successive stages of fact or successive steps or transactions is not, or may not be, double or multiple pleading; that statements by way of inducement or description may compose but parts of the narrative leading up to the final statement of the offense, and even that different means or methods of accomplishing the criminal end may be pleaded, provided there is no repugnancy, and that there is a common end.

But, a single count charging acts, each of which is or may be a crime but which have no relation one

to the other and no relevancy to the offense pleaded, is inescapably bad. If, too, there be added to these circumstances averments of acts or transactions of different defendants with their own individual associates, such acts and transactions having obviously no part or purpose in the scheme to defraud as originally designated, the quality of duplicity is aggravated.

Not only does the first paragraph of the indictment describe and limit the offense, it will be found that, also, after the intervening paragraphs narrating the organization of the corporation and the various acts of the defendants with reference thereto, the indictment proceeds to charge that "it has further a part of said scheme and artifice and in furtherance thereof, that the defendants, for the purpose of inducing the persons to be defrauded to part with their money and property *in the purchase of the common and preferred stock and debenture bonds* of said Clarence Saunders Stores, Inc., and its successors, would and did unlawfully, fraudulently and knowingly and feloniously make false pretenses, representations and promises to the persons to be defrauded." Here appears a further and more specific delineation of the offense, the representations now being charged as having been made for the purpose of inducing "the persons to be defrauded" to part with their money *in the purchase of the common and preferred stock and debenture bonds* (7).

Then ensue the series of allegations charging misrepresentation, all of which are alleged as being made to the persons to be defrauded, *by inducing them to purchase stock and debentures of the company.* These representations are the essence of the scheme.

In reading the indictment the court will note that each paragraph narrating the progress of events begins "It was a part of said scheme and artifice *that the defendants* should and they did" organize a corporation, change its name, cause the transfer of the Saunders franchise to the corporation and the issuance therefor of 151,000 shares of common stock, etc. Coming to the second and third paragraphs of the indictment appearing on page 6 of the printed transcript, the court will find an abandonment of this preliminary language and the allegation of events which by no possibility could comprise a part of the scheme to obtain money by false pretenses made "to the persons to be defrauded" in the purchase of stock and debentures.

It is alleged that H. D. Sanders and his associates organized, under the laws of Arizona, the Piggly Wiggly Holding Corporation, the name of which was subsequently changed to U-Save Holding Corporation on February 24, 1930, which corporation was thereafter engaged in business in Los Angeles, California. It is further averred that the said U-Save Holding Corporation acquired the majority of the common capital stock of the United Sanders Stores, Inc., proceeded to take charge of its assets and wrongfully removed certain of its merchandise, valued at more than $100,000.00, from the warehouses of the company in Phoenix, Tucson and Nogales, Arizona, shipping it to Los Angeles, California. The "associates" of H. D. Sanders are not named, and it must be presumed that they were not the defendants. As a matter of fact that this is true subsequently developed in the proof (281). What the wrongful acquisition of control of the corporation and the illegal removal of its assets could have to do with obtaining money and property from "the persons to be defrauded" by

means of false pretenses in the sale of stock and debentures, it is impossible to comprehend. These transactions simply will not fit in the frame of reference and, since they are alleged as constituting a series of wrongful acts pursuant to which the mails were used, it necessarily follows that they comprise also a separate scheme and, accordingly, a separate offense.

The actors are different, the acts and transactions are different and the party to be defrauded or against whom the acts and transactions operated, is different. Such allegations are as foreign to the scheme to defraud by means of false representations to buyers of securities as an inserted charge of larceny or embezzlement.

As has been said, when the indictment was submitted to the Grand Jury the pleader contemplated the continued existence of an indictment in seventeen counts. It is only when other counts, upon which appellants were not convicted and under which none of the defendants stood trial, are examined, that the purport of these allegations in the first count becomes plain. Then, also, it appears that these averments are, and were originally intended to be, the basis of separate subsequent counts which incorporated the first by reference. To repeat, the indictment charges a scheme to obtain money and property by means of false pretenses from various individuals. If the allegations under consideration are examined in connection with one of the alleged misrepresentations included in paragraph 10 of the fourteen numbered paragraphs of the first count it will be found that the representation there charged *does not include the effort to induce the persons to be defrauded to part with their*

money and property in the purchase of the stock and debentures of Clarence Saunders Stores, Inc., but, instead, necessarily contemplates a fraud upon persons already stockholders.

The true significance of the "H. D. Sanders" paragraphs is made apparent by an examination of Count Ten of the indictment (42) which charges that on February 19, 1931, at Los Angeles, California, *in said District of Arizona*, a letter was mailed to one W. H. Forman, "one of the persons to be defrauded." This letter is of extreme importance in determining the true purport of these paragraphs. It is dated at Los Angeles, California, *February 19, 1931* and is signed *H. D. Sanders, President.* It appears on the stationery of U-Save Holding Corporation *and requests the surrender of the stock of the original corporation* in exchange for the capital stock of U-Save Holding Corporation, asserted as having a book value of $18.60 a share. After setting out the letter, the Tenth Count of the indictment concludes that *the statements therein made by the defendants* were false and untrue.

Again, in Count Eleven (44) another letter is set forth (46) emanating from U-Save Holding Corporation, dated at Los Angeles, California, on *January 25, 1931*, and addressed to the stockholders of United Sanders Stores, Inc. In this letter, at great length, the holder of stock, alleged as having already been defrauded in the purchase thereof, is now exorted to exchange his stock for that of the U-Save Holding Corporation. This count also concludes that the statements made in said letter were false and untrue (50).

In Count Twelve, furthermore, a letter is included

from United Sanders Stores, Inc., dated at Phoenix, Arizona, on *January 10, 1931*, addressed to the stockholders of the company, it also refers to the activities of U-Save Holding Corporation. The count concludes that the statements in the letter were false and untrue (56).

Count Thirteen (56) discloses the associates of H. D. Sanders. This count includes a notice to the stockholders of United Clarence Saunders Stores, Inc. (56) and announces the forthcoming activities of U-Save Holding Corporation. It advises the stockholders in glowing terms as to the experience and reputation of H. D. Sanders, refers to him as a merchandising genius which has seldom been equaled and reports that associated with H. D. Sanders will be K. C. VanAtta, A. M. Kaler, Warfield Ryley, Cy Measday, J. S. Mackin and A. E. Sanders, the last being contemplated as a continuing member of the board of directors in charge of the Financial Department. The statement in this communication is also charged as false (65).

It will be seen that the foregoing uses of the United States mails are not only included in the counts mentioned as constituting the gist of the offense by the act of mailing but are, also, used to describe false representations. There is no charge of falsity as to the Driscoll letter in the first count. Thus, and thus only, the purpose of the allegations in the first count of the indictment respecting H. D. Sanders and his associates, the U-Save Holding Corporation, the acquisition of control and the removal of the merchandise becomes plain and with it the revelation that these allegations constitute beyond peradventure of doubt a separate and distinct scheme to be supplemented by allegations of *false pretenses made in the*

letters in the ensuring counts, not included in the first count and made the basis of a separate charge. "The persons to be defrauded," in addition to the corporation, under these allegations and as disclosed by the succeeding counts just discussed, are persons who have already parted with their money in the purchase of the stock and debentures by virtue of other representations previously made which is the avowed intent charged against the defendants in the first count of the indictment. (See page 7 of the printed transcript, second paragraph.)

Therefore, the allegations in the first count respecting the activities of H. D. Sanders and his associates do constitute a separate and distinct offense, in connection with which separate and distinct representations were made, charged as being false, and for which, alone, the defendants could be prosecuted. It would be idle to assert that the allegations under discussion could be regarded as mere surplusage when, upon the basis of such facts, the defendants could be compelled to stand trial. Certainly if some of the defendants participated in a scheme to obtain money in the original sale of the stock and, subsequently, others of the defendants only participated in the U-Save Holding deal and the effort to obtain the stock after it had been purchased, one class of defendants could be tried and convicted for one offense and the other class of defendants for the subsequent offense. Connecting the U-Save Holding Corporation events with the representations set forth in the letters included in the subsequent counts of the indictment, they constitute the undoubted basis of a separate and additional scheme or artifice in the furtherance of which the use of the United States mails would constitute an offense under Section 215 of the Criminal Code.

In the first count the people named as the persons to be defrauded are fifteen in number. In counts Ten, Eleven, Twelve and Thirteen the named persons are ten in number. Inasmuch as the fifteen names were known to the Grand Jury, as set forth in the first count, it is evident that five of them were not "persons to be defrauded" by means of the H. D. Sanders' transactions and representations. Therefore, the parties to be defrauded are not identical. The initial effort to acquire the property of the stockholders, i. e ., their certificates of stock in exchange for holding company stock, according to Count Thirteen, was on October 6, 1930 (58) which effort continued, according to Count Ten, at least to February 19, 1931. In the first count of the indictment the letter constituting the gist of the offense was dated April 9, 1930, months before the first steps taken with reference to H. D. Sanders and the U-Save Holding Corporation, but it was the date, however, when the scheme and artifice had been completely devised for the purposes of the first count and prosecution thereunder. Again, in the first count the scheme is alleged as continuing in existence to and including March 19, 1931 (3).

Under such analysis of the indictment it cannot be doubted that the conviction or acquittal of some of the defendants for the scheme to obtain, by false pretenses, the money of the persons to be defrauded in the original sale of the stock would not constitute a defense or prevent H. D. Sanders, or for that matter even appellants, from being tried for the scheme which had for its purpose the obtaining of property from persons who had been already defrauded in their original purchases.

Joinder of charges is made the subject of Federal

statutory provision in Section 1024 of the Revised Statutes of the United States; (U.S.C.A.) Title 18, Section 557. This provision is as follows:

> "Where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This Statute was evidently designed for purposes of expedition and convenience. By providing for what may be done under its provisions it is necessarily inferable that several charges against a defendant for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class *may not* be joined together in a single count. Compare: *Arnold vs. United States* 7 Fed. (2) 867, 869.

In *McElroy v. United States*, 164 U. S. 76; 41 L. Ed. 355, the defendants were indicted for an assault with intent to kill one Elizabeth Miller and they were also indicted for an assault to kill one Sherman Miller on the same day, April 16, 1894. They were, moreover, indcited for arson of the dwelling house of one Eugene Miller on May 1, 1894. Three of the defendants were indicted for the arson of the dwelling house of one Bruce Miller on April 16, 1894. The trial court ordered the four indictments consolidated.

The Supreme Court, in passing upon and reversing the judgment of conviction, established a rule neces-

sarily applicable, in principle, to cases wherein defendants are charged with different offenses in a single count. The court said at page 77:

> "The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment, and we are met on the threshold with the inquiry *whether counts against five defendants can be coupled with a count against part of them or offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time.*"

The court said, further, at page 80:

> "In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction. * * * * * Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error."

In *De Luca v. United States* (C. C. A. 2), 299 Fed. 741, the defendants were indicted for conspiracy to defraud the United States by removing cases of opium without paying import duties and they were also indicted for a sale in a package not originally stamped. A motion to consolidate the indictment for

conspiracy and for the violation of the Harrison Act was allowed, the first being against nine defendants and the second against five. The court reversed the judgment of conviction saying at page 743:

> "The effect of a consolidation of indictments is to render the consolidated indictments as one bill with as many counts as there are accusations. McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355; Porter v. United States, 91 Fed. 494, 33 C. C. A. 652. The word 'count' is made use of in the indictment where, in one finding by the grand jury, the essential parts of two or more separate indictments, for crimes apparently distinct, are combined. 1 Bishop's New Crim. Proc. Sec. 421. Where an accused is charged in a single bill with more than one count, it is the grand jury that consolidates the indictments; but, if separate bills are found, the court can do no more than was the privilege of the grand jury, for it has no greater power to consolidate. In the instant case the conspiracy indictment was against the plaintiffs in error and seven others. The indictment founded on the Harrison Act was against the plaintiffs in error and three others. Each indictment was against a definite group. Although it appears that certain of the defendants were members of both groups, others were not, and therefore the groups were distinct. The statute refers to several charges, which shall be against the same person, and when the charges are against more than one person, there can be no consolidation by the court, unless all the defendants are identical in all the indictments."

Speaking of the conspiracy count, the court said at page 745:

"This overt act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. Furthermore, it appears from the record that the sale of 102 pounds of opium was wholly distinct and apart from the conspiracy. The 102 pounds which were sold as proven did not come from the 20 cases. We are satisfied that the two crimes were wholly distinct from each other. They were conceived and perpetrated at different times. While both groups of the defendants might be said to have a similar general purpose in view of trafficking unlawfully in narcotics, this does not justify the consolidation of the charges into one bill and a trial thereof at one time."

In *McLendon v. United States* (C. C. A. 6), 2 Fed. (2d) 660, the defendant was indicted for the violation of Section 215 of the Criminal Code. The court reversed the judgment of conviction, saying at page 660:

"McLendon was engaged in the breeding, buying, and selling of bird dogs. Like every other legitimate business, this gives the trader, if he is so inclined, opportunity to defraud one customer after another by misrepresenting the quality of his goods, or by the great variety of expedients occurring to an ingenious scoundrel; but it has never yet been thought that the 'scheme to defraud' of section 215 of the Criminal Code could be found in *the mere succession of diverse swindles, unrelated save as they had a common stage.* It is not set out in the indictment or claimed in the proofs that McLendon's business was not, in substantial part, legitimate and satis-

factory to his customers; and so, if the indictment is to be held good, we must find in it an allegation of some general fraudulent scheme dominantly characterizing some part of his business."

Speaking further, the court said:

"Nor do we fail to observe the later allegation that the scheme was 'also by false and fraudulent pretenses and misrepresentations to acquire possession of dogs, and fraudulently, unlawfully, and feloniously convert the same to his own use, and thereby deprive the true owner thereof'. Not only are these charges too vague to be the basis of any prosecution, but there is no connection set out in the indictment, or otherwise obvious, between such a plan and the main one charged. There is no bond of unity between the two. To avoid thinking the indictment bad for duplicity, this last-quoted allegation must be disregarded as surplusage."

From the context of the opinion and from the fact that the judgment of conviction was actually reversed, it is clear that the court, by using language to the effect that the "false representations" portion of the indictment must be regarded as surplusage, did not intend to hold that the defect in the indictment could be thus remedied or disregarded for the purpose of sustaining conviction. This portion of the court's language is but a part of the general discussion of the opinion condemning such indictments. When, of course, evidence goes to the jury in support of a portion of an indictment which is bad for duplicity, it then becomes too late to attempt to deal with such portion as surplusage. By the introduction of evidence the United States attorney elects to

stand by his bad pleading and to place the acts erroneously charged before them, taking the consequences of a verdict which may be the result, in large part, of that portion of the proof which sustains one of the double aspects of the indictment.

In *Beaux Arts Dresses v. United States* (C. C. A. 2), 9 Fed. (2d) 531, an indictment was returned in three counts, the first charging conspiracy to conceal assets from the Trustee in Bankruptcy, the second charging the corporation with concealing assets and the individual defendants with aiding and abetting such concealment, and the third charging the use of the mails in execution of a scheme to defraud by obtaining credit in the aid of a false financial statement.

The question of misjoinder of offenses, as in the case at bar, was raised in the opening of the trial, renewed at the end of the government's case and at the close of all the evidence. The court held that *acquittal* on one misjoined count cured the misjoinder and said that "the duplicity of the indictment has been cured by the verdict of guilty *as to one offense only.*" In passing upon the question, however, the court said at page 533:

> "The proof to support the charge of concealing assets and conspiring so to do was of necessity different from the proof in support of the charge of using the mails in furtherance of a scheme to defraud. To prove a concealment of assets, or a conspiracy so to do would require proof of the filing of the petition in bankruptcy, adjudication in bankruptcy, appointment of the trustee, and the concealment of assets which should have been delivered to the trustee or an

agreement and understanding between the defendants below to do these things or have them done, and the doing of an overt act. To prove fraud in the use of the mails would require proof of a scheme to defraud being devised and the defendants below using the mails in execution thereof. In the latter crime, the conspiracy may be proven, and yet no proof of fraud having been actually committed. In concealing assets, fraud is an element necessary to establish guilt.

What we said in the De Luca Case, supra, is controlling here. There we held an indictment fatal which charged a conspiracy to defraud the United States of duties on opium, and also in another count charged the offense of unlawfully selling opium. The charge of using the mails here involves the sending of a false financial statement. The mailing of such statement could not be in furtherance of a conspiracy to conceal assets from the trustee, or of the substantive offense of actually concealing assets. The third count of the indictment was improperly joined with the first and second, and under McElroy v. United States, 164 U. S. 80, 17 S. Ct. 31, 41 L. Ed. 355, and De Luca v. United States, 299 F. 741, there was a misjoinder."

And so, in the case at bar, the proof to support the charge of the wrongful taking of the assets from Arizona to California would be of necessity different from the proof in support of the charge of using the mails in furtherance of a scheme to defraud. Moreover, proof of the events which followed the appearance of H. D. Sanders and his associates, upon the scene—which proof also demonstrated that the appellants had no connection with these circumstances,

—was also of necessity different from the proof in support of the charge that the defendants devised a scheme to obtain money in the sale of the stock and debentures to the persons to be defrauded, by false representations.

The case of *Creel v. United States* (C. C. A. 8), 21 Fed. (2d) 690, is squarely determinative, in this connection, of the case under review. There the defendant was convicted of violating the National Prohibition Act. Each of the two counts of the information charged both the "selling" and "furnishing" of intoxicating liquor. The judgment of conviction was reversed, the court saying at page 690:

> "Duplicity is the joining in one count of two or more distinct offenses. The question of duplicity may properly be raised by demurrer. Lemon v. United States, 164 F. 953 (C. C. A. 8); John Gund Brewing Co. v. United States, 204 F. 17 (C. C. A. 8); Wright v. United States, 227 F. 855 (C. C. A. 8); United States v. L. & N. R. Co. (D. C.) 165 F. 936."

At page 691 the court said:

> "In the instant case the allegations do not set forth different modes of commiting the same offense, but they set forth the commission of two different offenses. It is, of course, possible to furnish without selling; and it is also possible, though not so frequent, to sell without furnishing.
>
> It is suggested that the word 'furnish' may be disregarded as surplusage. We do not think this can be done. Words adequately charging a distinct offense cannot be rejected as surplusage. *If they could, the vice of duplicity in criminal*

pleading could be practiced with impunity. The language of the information, adequately charges two distinct offenses. If the words 'and furnish' are stricken out, there remains an adequate charge of sale. If the words 'sell and' are stricken out, there remains an adequate charge of furnishing. Leaving the language as it is, there are adequate charges of both sale and furnishing. The rule is stated in 31 C. J. 774, Sec. 334, as follows: ' * * * Where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another.' * * * * * * *

Nor can we assent to the contention that the duplicity was a mere technical defect, to be disregarded under Section 1025, Revised Statutes (U.S.C. tit. 18, Sec. 556 (18 USCA Sec. 556), and section 269, Judicial Code, as amended (U.S.C. tit. 28, Sec. 391 (28 USCA Sec. 391; Comp. St. Sec. 1246). The defect was one of substance, and not within the purview of either of those statutes.

We are constrained to hold, therefore, that there was a joinder of distinct offenses in each of the counts of the information, and that the demurrer should have been sustained on that ground. * * *"

So in the case now under review it was possible to sell the stock and debentures by representations without illegally acquiring control of the company or trading the holders out of their shares and it was also possible so to acquire control unlawfully and trade shareholders out of their shares without making original unlawful sales.

In *Lemon v. United States* (C. C. A. 8), 164 Fed. 953, the indictment, in one and the same count, charged both the devising of a scheme to defraud and a conspiracy to do the same thing. As to this the court said at page 958:

> "It is also urged that the indictment is bad for duplicity; that it embodies in one and the same count a charge of devising a scheme to defraud, and of conspiring to do the same thing. A most casual reading of the indictment discloses that both of these charges are made in each and every count of the indictment. They are therefore double, and would have been held bad for duplicity if seasonably challenged on that ground, either by a motion to quash, demurrer, or motion to elect, which are the three approved methods for doing it. Bishop's New Criminal Procedure, Sec. 442. The rule against duplicity stands in the law as a privilege which may be invoked or not at the election of the defendants. 1 Bishop's New Criminal Procedure, Sec. 442. But the defendants, instead of invoking this privilege, went to trial without objection on this ground, and the court tried the case as a scheme to defraud. It was then too late to raise this objection."

Appellants in the instant case, as has been seen, *seasonably and repeatedly* challenged the indictment.

In *United States v. Smith*, (D. C. W. D. Ky.) 152 Fed. 542, the court held that a count of an indictment charging both embezzlement and misapplication of the funds and credits of a national bank was bad for duplicity, saying at page 545:

> "The ninth count is open to similar objections,

with the additional one of duplicity, as this count charges the embezzlement, as well as the willful misapplication, of the 'funds and credits' of the bank, without setting forth any particular description of either, and without any separate statement as to the amount either of the 'funds' or of the 'credits' which had thus been embezzled or misapplied."

The cases upon the subject of duplicity are infinite in number and variety. No case has been found where the pleader has been permitted deliberately and at length to inject into one count of an indictment a set of circumstances having no relation to the charge mainly averred and which constitutes, in effect, a separate offense and the basis of separate prosecution. The district attorney, under no sound theory, may rest content with what has been denominated a "Mother Hubbard" indictment and catch defendants somewhere within its voluminous folds.

The court's attention is respectfully directed to the following illuminating cases:

Coco v. United States (C. C. A. 8), 289 Fed. 33, 34, 35;

Pointer v. United States, 151 U. S. 396; 38 L. Ed. 208;

United States v. Blakeman (D. C. N. D. N. Y.) 251 Fed. 306;

United States v. Morse (C. C. S. D. N. Y.) 161 Fed. 429, 437;

United States v. Morris (C. C. D. Ore), 18 Fed. 900, 903;

United States v. Hopkins (D. C. S. D. Fla.) 290 Fed. 619, 620;

Beck v. United States (C. C. A. 2), 145 Fed. 625.

To treat as surplusage the paragraphs of the indictment relating to H. D. Sanders and his associates, the organization of the U-Save Holding Corporation, the acquisition of control of the company and the removal of its merchandise from Arizona to California, important and deliberate allegations, would be to strike them from the indictment as effectually as if a line had been physically drawn through the words, and with greater prejudicial effect. If the indictment be treated as if these allegations were nonexistent, the court would be proceeding under a count not given to and certainly not presented by, the grand jury. Who can say with what seriousness the grand jury regarded these averments or whether or not the indictment would have been returned at all in the absence of the alleged manipulations with the corporate stock and with its control, and in the absence of the apparently brazen removal of over $100,000.00 of merchandise.

As was said in the matter of *Ex parte Bain, Jr.*, 121 U. S. 1, 13; 30 L. Ed. 849, 852, in speaking of the propriety of an order of the trial court striking from an indictment the words "The Comptroller of the Currency and," and in holding such action invalid:

> "The learned judge who presided in the circuit court, at the time the change was made in this indictment, says that the court allowed the words "Comptroller of the Currency and" to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the

motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. *But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument.* While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him."

This court in *Stewart v. United States* (C. C. A. 9), 12 Fed. (2d) 524, held that an assignment of error based upon the action of the trial court in striking from an indictment as surplusage the words "feloniously and," in one place, and the words "and feloniously," in another, was well taken. After quoting with approval the opinion by Mr. Justice Miller in the *Bain* case (121 U. S. 1), the court said at page 525:

> "In the course of the opinion there is some discussion of the question as to whether the grand jury would have returned the indictment with the stricken words omitted, but an examination of the entire opinion shows very clearly that the decision was based upon the broad ground that under English and American law no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute."

The court then quoted from the opinion in *Dodge v. United States*, 258 Fed. 300, as follows:

> " 'At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for the defendant at once said "No objection." The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted."

After the opinion had been rendered by this court in the *Stewart* case, the indictment was restored to its original form and the defendants again tried and convicted. The judgment was affirmed by this court in 16 Fed. (2d) 863. Even with such restoration, however, Judge Rudkin entered a strong dissent saying, in part, at page 864:

> "I dissent. The conclusion of the majority must be sustained, if sustainable at all, on one of two theories: First, that, in addition to the void indictment before this court on the former writ of error, there lurked some place in the

records of the court below a valid indictment; or, second, that that court now has power to make a valid indictment out of a void one. Either conclusion is, in my opinion, utterly inconsistent with the language of the Supreme Court in Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849."

In *United States v. Wills* (C. C. A. 3), 36 Fed. (2d) 855, the court distinguished between unnecessary words which may be rejected as surplusage and language descriptive of the offense. The court said at page 858:

"'Undoubtedly there is a general rule of law that all unnecessary words may be rejected as surplusage, if the indictment would be good upon striking them out. But that rule is not an unqualified one. *An interwoven limitation upon the operation of that principle is that, if the immaterial averments are in any sense descriptive of the identity of what is essential, then they cannot be rejected as surplusage.* Wharton's Criminal Ev. Sec. 138. In U. S. v. Howard, Fed. Cas. No. 15, 403, Mr. Justice Story said: '* * * No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage.'" * * * * * * The object of an alleged conspiracy is that which identifies and describes the particular unlawful agreement or conspiracy with which the defendant stands charged. *No part of that description may be ignored as surplusage.* It must be proved as laid."

While it is obviously possible to strike mere words or even expressions from an indictment as surplusage, it is inconceivable that whole paragraphs positively averred as constituting part of the offense can be so perfunctorily disregarded. So to do would be to accomplish by indirection that which could not be done directly,—would be to inject into a criminal trial an insidious danger not realized or even discoverable until too late.

The vice of duplicity in the indictment was aggravated in its prejudicial effect when the district attorney elected to introduce evidence of the H. D. Sanders and U-Save Holding Corporation events. Instead of abandoning these allegations, therefore, the district attorney stood by them.

When this evidence was introduced, over objection, and the court refused to strike any part of it, the die was cast and the case went to the jury with evidence of an alleged scheme to obtain money from prospective buyers of stock by false pretenses charged against all of the defendants and with evidence of another allegedly fraudulent design to obtain the shares so originally sold from them, to acquire control and to remove $100,000.00 of property. The defect of duplicity became thus sealed into the case.

II.

THE FINANCIAL STATEMENTS PREPARED BY L. D. NULL, BEING GOVERNMENT'S EXHIBITS 89, 90 and 91, WERE ERRONEOUSLY ADMITTED IN EVIDENCE. (Specifications of Error 4, 5, 6).

Having introduced evidence of the representations made to buyers or prospective buyers of stock and

debentures of the corporation and having shown that dividends were paid for the period ending December 31, 1929 and for the period ending June 29, 1930, the Government next sought to demonstrate that the representations were false and that the payment of dividends was made out of capital or, at any rate, not out of earned surplus. The obvious method of establishing falsity is, of course, to prove the truth. This lay in the very heart of the Government's case.

In its effort to show the true financial condition of the company the Government succeeded in introducing in evidence, over objection, the so-called Null summaries or financial statements. Exhibit 89 is a profit and loss statement for the year 1929 showing the cost of goods sold, the selling price and expense of operation, in general totals, with a computed resulting loss from operations (366). Exhibit 90 is a similar profit and loss statement for nine months ending September 30, 1930 (374). Exhibit 91 purports to be a balance sheet indicating assets, liabilities and net worth as of September 30, 1930, with the accountant hesitant and doubtful as disclosed by his scratched figures and his careless insertion of the line, "Net Worth September 30, 1934" (378).

It is impossible to tell from any of these exhibits exactly what the financial situation was *on any date* or at any time prior to the end of the respective periods indicated. A marked drop in the market at any time during the period might have required large quantities of goods to be sold at a loss and might have resulted in the small margin of gross profit. A great variety of questions appear on the face of the profit and loss statements. What, for example, were the items that made up the "unclassified expense" of $43,859.67 (366)? Were there on hand at the end of 1929 large quantities of merchandise

bought low and held for a rising market? Or had the market actually risen on important quantities of goods with resulting favorable differences in price showing a profit? What are the items that go into the total traveling expense of over $7,000.00 (366)? Does this include trips of A. E. Sanders in connection with his other projects? What is the breakdown of the depreciation item? It is not even possible to tell whether the sub-totals are correctly added.

Aside from the generality of the exhibits, appearing on the face thereof, the documents were clearly inadmissible against appellants upon grounds so plainly substantial that the error of their admission is, when the record of the proceedings is known, immediately apparent. Exhibits 89 and 90 were but parts of what was termed an "Auditor's Tentative Report," a document consisting of some two hundred seven pages prepared, not by Null alone, but, as Null stated, by his partner, Wood, and by Ray and Bradford as well (362). Indeed, from appellants' tendered and refused Exhibit G (429, 430) it appears that one Canning and one Bradford also worked upon the audit for a total of two hundred nineteen days. From this refused exhibit it appears, also, that not Null but Walter A. Wood was the auditor who actually prepared the report and had supervision of it (430). Although Null testified that he checked everything exerybody else did, it is inconceivable that he duplicated their efforts in his actual perusal of the same original sources. Nevertheless, by means of his testimony, these sheets were received in evidence over detailed objection, successfully resisting appellants' motion to strike and every other attack made upon them.

It would be idle to contend that appellants had an

opportunity of examining the same sources which took five men a total of over five hundred man-days to accomplish. And it would be equally futile for appellants to offer to the jury the six ponderous volumes which were present in court even if these books were, as they were not, admissible and contained every necessary entry.

Summaries, financial statements and compilations of experts are permitted in evidence where the books and records evidencing facts which may properly be shown are too voluminous and complicated to submit to a jury. But before such expert testimony is admitted the books and records underlying the expert statements must themselves be admissible as to the party against whom they are offered. This would seem to be self-evident.

Upon this branch of the argument appellants make the following contentions:

(1) Even if all of the books and records underlying these exhibits were actually available, they would not be admissible against appellants because it was affirmatively shown that appellants had no connection with them, no knowledge of them and no control over them. They constituted, therefore, pure hearsay.

(2) Even if the barrier against hearsay evidence be disregarded, no foundation was laid for the introduction of these exhibits, because:

(a) All of the supporting records were not identified and, indeed, were not even in court.

(b) Such books as were in court were themselves but summaries and would not establish the correctness of the exhibits.

(c) Those of the books as were present in court were not properly or fully identified.

(d) The books and records of the company were shown to be incorrect and to have been kept under the supervision, for a considerable period, of a self-confessed manipulator.

(e) None of the books and records from which the exhibits were compiled was offered or introduced in evidence.

(f) No opportunity was given to appellants adequately to examine and verify the summaries or to examine even those six volumes which were piled upon the table of the Government counsel.

It may be laid down as an indisputable postulate to the following discussion that before expert summaries of books and documents are admissible, sufficient evidence must first be given demonstrating the admissibility in evidence of the books and documents themselves. In other words the admissibility and competency of an expert summary depends upon the admissibility of that which the document purports to summarize. Moreover, men whose property, and especially whose liberty, are in danger should be given recourse to the same sources of information possessed by the accountant in preparing his computations.

In a leading case upon the subject, *Phillips v. United States* (C. C. A. 8), 201 Fed. 259, the court said at page 269:

"So far as the error assigned as to the admission of the expert testimony bearing upon what the books showed, it may be stated that it is

proper for an expert accountant to give a summary of books and documents, where the items are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. Wigmore on Evidence, Sec. 1230. We think, however, that the true rule is that before such expert testimony may be given the books or documents must be public records, or, if they are private books of account or documents, that sufficient evidence must first be given to admit the books or documents themselves in evidence, unless the books or documents are admitted to be correct. Otherwise, items in books of account might be given in evidence through the testimony of an expert accountant, when the account books themselves would not be admissible. This would seem to be wrong in principle and dangerous in practice.

For the error in the admission of the books of the Hanover National Bank, and in allowing an expert accountant to testify as to what they showed, in the absence of testimony which would allow the books themselves to be admitted, the judgment of the court below is reversed, and the case is remanded to the United States District Court for the Eastern District of Oklahoma, with directions to grant a new trial."

The evidence for the Government conclusively proved that appellants had no connection with, knowledge of, or control over, the books of account and records of the corporation. The company was actively engaged in the wholesale and retail grocery business, in the conduct of which it made leases for stores and warehouses, it acquired fixtures, equipment and

automobile trucks, it made large purchases of merchandise for resale and sold both at wholesale and retail, it paid salaries and wages in a large amount, contracted for advertising and, in short, conducted the transactions usual to such a business. With no part of this did appellants, under the express and repeated testimony of the Government witnesses, have any connection or participation.

Brandt testified that appellant, Gus Greenbaum, "had nothing whatsoever to do with the entries in the books of the stores company." And he said that appellants, William Greenbaum and Charles Greenbaum, did not "have anything whatsoever to do with the books and records of the stores company, nor with the entries in such books and records" (334). At another point in his testimony he said: "Their (appellants) books were not kept at the warehouse, as the Bond and Mortgage Corporation was separate and apart from the stores company. The Bond and Mortgage Corporation had no direction or control over what entries should be made in the books of the stores company as that was exclusively under my control and under my direction" (332).

A. E. Sanders himself said that appellants' company, the Bond and Mortgage Corporation, "was not connected with our company at any time" (348). Thus, far from attempting to establish some measure of contact between appellants and the books and records, the testimony on behalf of the Government negatived such a possibility.

When the undeniable facts are examined it will be found that the leeway granted to counsel for the Government by the trial court surpasses understanding. Even if the hearsay rule be disregarded, the

Government's own case demonstrates that there was no foundation for the exhibits under consideration. Null testified that in the preparation of the audit he examined literally hundreds of documents and sources of information (363), and, although he stated that he could prepare the exhibits from the books in court, this would be possible only because he had examined and checked the underlying original records. He said "We examined many other books and records other than the exhibits which are here in court. In order to prepare the tendered exhibit correctly you would have to examine those other records which are not now here" (364). Again he said "*The basic books, records and memoranda which underlie that financial statement are not in court and since the trial opened they have not been in court, that is, not all of them.*" Yet again he stated "I would not assume that the books and records on the table are sufficient underlying data to make up a verified profit and loss statement from. In other words in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369).

Speaking of Government's Exhibit 91 he said, "I took this balance sheet directly from the books there on the table, and the information contained there, *plus* the information in my previous experience with the underlying records, is what went to make up this balance sheet. Those books which are not here were the records upon which the entries in this book were based" (373). Then he made the surprising assertion, "I would think that Government's Exhibit 89 for identification is true and correct in its entirety. I wouldn't say that there are several items in that statement which do not coincide with the book entries of the stores corporation because this is a matter of

interpretation. I might draw one conclusion and you another. That is not true of my entire audit" (365).

The sum and substance of Null's testimony in this connection therefore is, in effect: These are summaries which I prepared but which I cannot verify and which you cannot verify as to correctness without underlying records which are not here. You must, therefore, take my word for it since you cannot accurately check me back.

It was conceded by the Government on the trial that the books of the corporation which were present in court, but not introduced in evidence, were themselves but *summaries* of other books and records of original entry. After such a statement had been made by one of counsel for the Government the court interrupted saying, "You don't mean that"? Whereupon counsel stated, "*These books are a summary, your Honor, of the original entry books*" (370).

As has been said there was no identification whatsoever of the books of account physically present for the first ten months of the company's existence. Brandt was not employed until September 15, 1920 (251), while the corporation was organized in October of 1928. The record is uteerly silent as to any identification of any book or record or of any entries made therein prior to Brandt's employment. After he became employed he did not have supervision of the books for some indeterminate period, being first engaged as a mere "ledger man55 (251). Indeed, there is no way of telling when the books were opened or when closed. To this extent, therefore, the Null summaries are utterly without foundation.

One of the most important elements which sponsored the shop book rule and followed its development

into modern systems of complicated accounting, is that entries made in books of account regularly kept, in the legal sense, carry with them a circumstantial guarantee of authenticity. This presumption of faithfulness was overcome in the case at bar by the startling admission of the very witness upon whose identification, such as it was, of the books, such as they were, the Null summaries rested. Brandt stated that he had deliberately manipulated the entries in at least one important particular (418). Inasmuch as the testimony of this witness will be analyzed at a subsequent point in the argument, more need not here be said upon the subject. With the words, "Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry and I showed it as a check to Phoenix Packing Company for $5,000.00, and on the duplicate voucher I showed a charge against the Kansas unit" (418), the circumstantial guarantee of authenticity vanished. Enough was admitted by Brandt to create a strong suspicion that not only was the entry fictitious but that it was the means used by him for an outright embezzlement. Notwithstanding the grave importance to the case of Brandt's identification of the books, the court promptly interfered with the full demonstration of his crookedness and permitted his testimony to constitute one of the corner stones of the Government's case.

None of the books and records from which Exhibits 89, 90 and 91 were compiled was offered in evidence by the prosecution, nor were they actually tendered to appellants for examination. No statement was made that the case would close without the actual introduction of those books of account which were present in court and it was, therefore, naturally assumed that they ultimately would be of-

fered in evidence and an opportunity afforded to appellants to examine them and to use them for the purpose of cross-examining Brandt and Null.

When Null took the witness stand for the purpose of laying the foundation for the introduction in evidence of Exhibits 89, 90 and 91, he testified that he spent some six months examining the books of the company and made a profit and loss statement which he said "I have here in my audit" (360). The audit referred to was a document consisting, as has been said, of two hundred seven pages, bore the case number of a case pending in the Superior Court of Maricopa County, Arizona, and was entitled "Auditor's Tentative Report." This voluminous document was handed to counsel for appellants about 11:05 o'clock, A. M., on November 15, 1934, and at 11:10 o'clock A. M., the court stood at recess. At 2:00 o'clock of the same day counsel for appellants announced that they could not even read, much less understand, the two hundred seven pages of computations, whereupon the court took a further recess until 10:00 o'clock, A. M., the following day. Less than one full day, therefore, was accorded to appellants to examine and make a check of the report and, so far as the books of account were concerned, they remained securely in the possession of the District Court Clerk whose office closed promptly at 5:00 o'clock, P. M. (361). It had taken Null and his associates six months (360) and a total of five hundred twenty-eight man-days (430) to make the examination of the affairs of the company upon which the general profit and loss statements and the balance sheet were founded. Yet appellants were expected to become, in less than six hours, sufficiently familiar with the sources of information back of these financial statements (the records of original entries not being present, identi-

fied or even fully described) to enable their counsel to conduct an adequate cross-examination. It is believed that this court will have little patience with such an unconscionable restriction of the rights of men standing trial for their liberty.

Expressions are occasionally found in the books to the effect that the same rules governing the introduction of books of account and expert summaries based thereon do not apply to a case where the Government seeks to establish the financial condition even of a third party as a fact collateral to the main issue. Such expressions, usually *dicta*, must, however, be examined in connection with the particular proceedings before the court. Examples of such cases will be analyzed in this discussion.

No matter what may be the opinions of other jurisdictions, this court is committed to the view which is resolutely protective of the rights of persons accused of a criminal offense.

In *Osborne v. United States* (C. C. A. 9), 17 Fed. (2d) 246, the defendants were indicted and convicted for violating the Mail Fraud Statute. While the court affirmed the conviction under the particular facts before it, it laid down the following rule, quoting from *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 151 Pac. 657:

> " 'In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in regular course of the business, that the business is of a character in which it is proper or customary to keep such books, that the entries were either original entries or the first perma-

> nent entries of the transactions, that they were made at the time, or within reasonable proximity to the time, of the respective transactions, and that the persons making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of the business.' "

After quoting from the leading case of *Chaffee & Co. v. United States*, 18 Wall, 516, 21 L. Ed. 908, the court said at page 248:

> "Measured by this rule it is quite apparent that a proper foundation was not laid for the admission of all the books and records received in evidence; and, unless shown to have been accurately kept, *the books of a corporation are not ordinarily admissible against its officers and stockholders*, in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith."

It must be noted that, in the *Osborne* case, the false pretenses related to the sale of sections or lots in two cemeteries owned by corporations dominated and controlled by the defendants. One of the principal elements of the case was the sale of the same sections to different purchasers, or what was called "duplications." Upon this subject the court said:

> "There was testimony tending to show that the books containing the records of sales of lots

> or sections were properly and accurately kept, and that they were used by the plaintiffs in error or by their employees under their express direction for the very purpose for which they were used by the Government, namely, for the purpose of ascertaining the lots or sections that had been sold to two or more purchasers."

The court said further at page 249:

> "Indeed, it clearly appears from the record that these books were the only source to which the plaintiffs in error and their employees could resort and did resort for information concerning the manifold activities in which the plaintiffs in error and the finance company were engaged."

The court concluded that the corporate books of account were in effect the books of a copartnership since the defendants were merely using the corporate vehicle for their activities. In this connection the court said:

> " 'The defendants, Cullen and Dennison were the corporation. They owned the stock, and had entire control and ownership of the corporate property. They were, respectively, president and secretary of the corporation. They passed all the resolutions of the corporation, conducted its correspondence, and managed its activities. They were, in effect, partners operating through the instrumentality of a corporation. That they were acquainted with the contents of their books is a justifiable inference. Under such circumstances there was no error in admitting the evidence.' "

Certainly the grounds of admissibility existing in the *Osborne* case are not present in the case at bar.

In *Chaffee & Co. v. United States*, 18 Wall. 516, 21 L. Ed. 908, the defendants were proceeded against in debt to recover a penalty under the Revenue Act for having in their possession distilled spirits for the purpose of sale and with the design to avoid the imposition of duties. In making its proof the government offered in evidence the certificate books of certain collectors of tolls. The court said at page 912:

> "When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently, a similar objection was taken to each of the certificates, on a motion to exclude them from the jury.
>
> The books were not public records; they stood on the same footing with the books of the trader or merchant. The fact that the lease was from the state did not change the character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the state. Their admissibility must, therefore, be determined by the rule which governs the admissability of entries made by private parties in the ordinary course of their business.
>
> And that rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court. The testimony of living

witnesses, personally cognizant of the facts of which they speak, given under the sanction of an oath, in open court, where they may be subjected to cross-examination, affords the greatest security for truth."

The case of *Hagan Coal Mines Inc. v. New State Coal Co, et al.* (C. C. A. 8), 30 Fed. (2d) 92, while a civil case, is clearly illustrative of the better-considered rule. The court said at page 93:

"The evidence which was received over objection consisted of several statements purporting to show: Total sales and expenses of defendants for the contract year and also for several years prior; amount of coal delivered by plaintiff and commissions earned thereon by defendants; selling expenses and comparison thereof with prior years; allocation of selling expenses to wholesale business; total sales at wholesale, including coal bought from others than plaintiff; cost per ton of selling the additional coal. These statements had been prepared by a public accountant from books and documents which were furnished him by defendant. The books and documents were present in court. They were identified as being books and records belonging to defendants. There was no objection to the summaries as such, but the objection was that the books themselves were neither offered and received in evidence nor was there a sufficient foundation laid for them to be so received. We think the objection should have been sustained. In the absence of statute, the general rule governing the introduction of books of account of a party in his own favor is that a foundation must be laid by proof of their character, authenticity, correctness and regular-

ity. 22 C. J. Sec. 1035, p. 864; *Phillips v. United States*, 201 F. 259 (C. C. A. 8); *Pabst Brewing Co. v. E. Clemens Horst Co.* (C. C. A.) 229 F. 913.

Plaintiff places reliance upon the case of *St. Paul F. & M. Ins. Co. v. American Food Prod-Co.* (C. C. A.) 21 F. (2d) 733, in which this court held that in cases where necessity required books of account and summaries therefrom might be received in evidence without the testimony of the persons who made the original memoranda from which entries in the books were made, providing there existed circumstantial guaranty of trustworthiness of the books. In that case the evidence showed that the books from which summaries had been made were regular books of account; that the entries therein were made in the regular course of business from data sent in by sales agents; that the entries in the books were correctly made. The persons who furnished the original data were not available as witnesses."

In *Beck v. United States* (C. C. A. 8), 33 Fed. (2d) 107, the defendant was convicted for violation of Section 215 of the Criminal Code. In speaking of the books of account which had been introduced in evidence against the defendant, the court said at page 113:

"These books, however, were not identified in accordance with the rule laid down by this court in *Phillips v. U. S.* (C. C. A.) 201 F. 259, where the records of a national bank, identified by its city manager, were excluded. The court concluded a long summary of the cases by saying:

'If this rule obtains in civil cases, it should

not be relaxed in criminal cases. It results, therefore, that the books of the Hanover National Bank were improperly admitted in evidence, in the absence of the testimony of some person who either had some knowledge of the correctness of the entries made, or some knowledge of the original transaction upon which the entries were founded, and in the absence of testimony showing that the person or persons who possessed such knowledge were either dead, insane, or beyond the jurisdiction of the court.'

"This rule has been recently applied in *Hagan Coal Mines v. New State Coal Co.*, 30 F. (2d) 92 (8 C. C. A.). Before the books were admissable in this case, there should be some showing, by competent evidence, that the entries therein are correct, and reflect, as far as they purport to do so, the true condition of the corporation, or its activities."

The case of *Barrett v. United States* (C. C. A. 8) 33 Fed. (2d) 115 arose out of the same set of facts as the Beck case just discussed., and this is the authority relied upon below. The identification of the books of account was meager. The bookkeeper who made a few of the entries was not in court, nor was his absence explained. But the court said that the objection of the defandant that the corporate books were not binding on him because he was neither an officer nor stockholder of the company was not sound. Said the court at page 115:

"The government does not offer the books as binding on any one; the government seeks to show how much money came in to the corporation, and where it went, a circumstance bearing

> on fraudulent intent. *If the books, properly identified,* assist in proving that fact, they are admissable whether Barrett knew of the books or not."

This broad statement, however, was greatly narrowed by the next sentence of the opinion as follows:

> "To make the *fact* of receipts and disbursements material, the government, of course, must show that Barrett knew, at least in general, how the money was being spent."

The important language of the opinion, however, is found in the words, "*if the books are necessary evidence, they must be identified as required by the case of Phillips v. United States* (C. C. A.) 201 F. 259." This language is directly applicable to the instant case because the books of the corporation contain the evidennce which would demonstrate the truth or falsity of representations as to financial condition. The proof of falsity being indispensable and that proof resting upon the corporate books, they become inescapably, "necessary evidence" and, therefore, the rules of identification, familiarity with the facts, regularity of their keeping and the faithfulness of their contents must be followed.

As was stated in *Kaplan v. United States* (C. C. A. 2), 229 Fed. 389, 390, "the crucial question, however, is whether or not the defendant devised a scheme to defraud by using false statements of his financial condition to induce the sale to him on credit of a large quantity of goods which, had the truth been known, would not have been sold. Here, the controlling consideration is the truth or falsity of the statements."

In *Pabst Brewing Co. v. V. E. Clemens Horst Co.,*

(C. C. A. 9), 229 Fed. 913, an action was brought to recover damages for the breach of a contract for the sale of hops. With reference to the attempt of the plaintiff to prove damages, the court said at page 918:

> "One of the witnesses for the Horst Company was permitted to testify from figures compiled from the books of the Horst Company, showing office expenses in New York and Chicago, insurance charges, warehouse charges, freight charges and other miscellaneous charges, and that the 2,000 bales of hops sold at an average net price of 13.66 cents per pound over and above these various charges. This testimony was clearly inadmissible. The books themselves afforded the primary evidence of their contents, and as long as they were accessible and unaccounted for any evidence as to what they contained or showed was secondary and incompetent. This rule is elementary."

In *Worden v. United States* (C. C. A. 6), 204 Fed. 1, the defendants were jointly indicted on a charge of conspiracy to defraud the United States in the purchase of public lands. The books of account of one of the defendants and of the corporation which was involved were admitted in evidence. The court said at page 6:

> "Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions, and without the necessity of strict authentication beyond establishing the identity of the books. *Foster v. U. S.* (C. C. A. 6) 178 Fed. 165, 175; 101 C. C. A. 485, 495, and authorities cited. The

corporation, however, is not here the opposite party; there was no affirmative proof that the books were correctly kept; and while the rule is well settled that entries in the books of a corporation showing dealings between it and its managers are competent evidence against the latter, even in a criminal prosecution, on proof of such connection and familiarity with the books as to justify an inference of actual acquaintance with their contents, as being admissions or assertions of the facts stated therein *(Foster v. United States*, supra; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *Olney v. Chadsey*, 7 R. I. 224; *Bacon v. United States*, 97 Fed. 35, 40, 38 C. C. A. 37), yet such is, we think, the only theory on which the entries in question can be held competent evidence against the defendants. *State v. Ames*, 119 Iowa, 680, 684, 94 N. W. 231; *Lang v. State*, 97 Ala. 41, 46, 12 South. 183; *Bartholomew v. Farrell*, 41 Conn. 107, 111.

"The record, we think, fairly presents the objection that sufficient connection was not shown between defendants and the books of the lumber company to make the book entries competent evidence."

At page 8 the court said:

"It clearly appears that Person had nothing to do with keeping the books. He was simply superintendent, and there is nothing to indicate that he knew anything about bookkeeping or that he paid any attention to it, or that he directed any of the entries in question. Moreover, he severed his connection with the company as early as January 1, 1907 (if not earlier), and a large

number of the bookkeeping entries put in evidence (including those claimed to show that payments, at or before the execution of final proofs, were made to at least five entrymen) are later than that date, although the applications of the entrymen for land purchases were all made before Person retired. The showing was not such as, in our opinion, to justify a ruling that the bookkeeping entries were competent evidence against him. Person was thus prejudiced even if (as is not quite clear) he failed to save the question of the competency of Worden's books. As to Worden: There is no evidence that he had at any time anything to do with the bookkeeping, or even that he ever looked at the books. * * * Unless the mere fact of Worden's presidency and management of the company raised a legal presumption of his acquaintance with the book entries, thus putting upon him, in defense of a charge of crime, the burden of rebutting such legal presumption, we think the books cannot, in the peculiar state of this record, be held as matter of law competent evidence against him. *We have found no persuasive decision sustaining such legal presumption (in the absence of statutory requirement of correct bookkeeping) except on proof that the books were kept under the instruction, direction or supervision of the person against whom the entries are offered, or that such person presumably had examined the books or in some way obtained actual knowledge of the entries.*

The court, in the *Worden* case, distinguishes the cases where the books of account of a national bank are permitted in evidence in a prosecution of the president for making false reports of the bank's con-

dition, not only upon the ground that such defendant is the chief executive and as such actually has control and direction of the banks affairs, but, also, because the Act of Congress enjoined, under severe penalties, that the books should be truthfully kept.

In *Norcott v. United States* (C. C. A. 7), 65 Fed. (2d) 913, the government in a prsoecution under the Mail Fraud Statute offered in evidence an audit of the books of H. O. Stone and Company made by an auditor employed by the Securities Commission. The court, in holding the audit inadmissible, said at page 916:

> "It is further contended by appellants that the court erred in excluding an audit of the books and appraisal of the assets of H. O. Stone and Company made by an auditor and an appraiser of the Securities Commission of the State of Illinois. These documents were not identified by their respective authors, and so far as the record discloses, the authors were not available for cross-examination, and no one testified as to the accuracy of the documents. Under those circumstances the audit and appraisal were properly excluded as hearsay evidence."

In *Singer v. United States* (C. C. A. 3), 58 Fed. (2d) 74, the defendant was prosecuted for evading his income tax. During the trial certain memoranda known as settlement sheets were introduced. The court said at page 76:

> "Original entries of transactions made in the regular course of business when the entrant is dead or otherwise unavailable upon being identified are admissible. Such entries are also admis-

> sible when the entrant is present, identifies them and testifies that they are true, though they do not refresh his memory and he has no independent recollection of the truth of the transactions which they record. This rule grew up as a matter of convenience, but, under the exigencies and complexities of modern business, it has become a rule of necessity without which the administration of justice in many matters would be difficult or impossible. The '*J. S. Warden*' (C. C. A.) 219 F. 517, 521, and the many cases there cited. It is clear that these memoranda do not come within the above rule, and it was error to admit them in evidence. Government Exhibit 94 likewise was inadmissible because it was not shown that the entries were made in the regular course of business, nor who the entrant was, nor whether or not he was available for testimony."

In the case at bar, it will be recalled, there was no testimony whatsoever as to entries in the books of the corporation from the time of its organization to the date of Brandt's employment, a period of some ten months' duration. Moreover, Brandt said, merely, that he had made some of the entries and others in the employ of the company had made entries without attempting to identify which of the entries were made by him and which by others.

The following well-put observation of the court in the *Singer* case is entitled to special mention as a bit of legal philosophy in these days too frequently forgotten:

> "Innocent men may be indicted and convicted, and guilty men may be acquitted, but both good and bad men are alike entitled to the application

> of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administration of the law. When these rules, under the stress and strain of a trial, have been violated, it does not cure the injury to reply with the stereotyped argument that it does not appear it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is 'that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless'."

In *McDonald v. United States* (C. C. A. 6), 241 Fed. 793, the court, in reversing the judgment of conviction against one of the defendants for the violation of Section 215 of the Criminal Code, said:

> "Evidence was received as to the contents of the books of the Memphis bank of which Hendrey was president. This bank was a corporation, and the contents of the books of the corporation could not be put in evidence in a criminal prosecution against the president, without a more direct showing of his personal responsibility for the bookkeeping than we observe here."

There are a number of decisions of the state courts which are illuminating upon this phase of the argument and to which the court's attention will be briefly drawn.

In *People v. Mitchell* (Cal.) 29 Pac. 1106, the defendant was convicted of second degree murder. The question become material as to when a certain train arrived and departed from a station. The prosecution introduced a register kept in the station in question

in which the conductor recorded the time of arrival and departure. The witnesses testifying with reference thereto had no actual knowledge of the time of arrival or departure nor was the conductor, who made the record, called as a witness. The court held, first, that the conductor who made the original entries should have been called unless it be presumed that he was absent or dead, and, second, whether the record was properly identified or not, the register itself was but hearsay evidence as to defendant and should have been excluded.

In *Wade v. State* (Tex.), 35 S. W. 663, on a trial for receiving stolen cattle, the government attempted to introduce the records of a railroad company containing details of shipments and brands. The court said:

> "This testimony was upon a material issue in the case. It was evidence introduced for the purpose of showing the possession by the defendant of the head of cattle charged in the indictment, or his acts in regard to the same, which was intended to supplement and corroborate other testimony in the case upon this point; and it was very important evidence on the part of the state, in order to connect the defendant with the crime charged against him. It was illegal testimony, and ought not to have been admitted."

In *State v. McFalin* (Nev.) 172 Pac. 371, it was held that in a prosecution for embezzlement it was improper to introduce books of account where the defendant was not familiar with them and his attention had not been called to the particular acts to which the evidence related.

In *Tipps v. Landers* (Cal.) 190 Pac. 173, it was held that a book of account showing on its face that it was not kept in the usual course of business and did not contain all of the dealings between the parties had no probative value above that of a mere memorandum which could be used for the purpose of refreshing recollection.

There are some cases, upon which appellee will probably rely, which, upon cursory reading, might indicate departures from the rules announced in the foregoing decisions. Upon the analysis in the opinions in such cases, however, it will be found that there are always important factors which lead to the seeming divergence of views.

Such a case, for example, is *Stephens v. United States* (C. C. A. 9), 41 Fed. (2d) 440, in which the defendants were indicted under the Mail Fraud Statute. In that case it appeared that during the trial the prosecution had acquired two hundred fifty volumes of books and records of the company involved in the prosecution, all of which were kept, for convenience, in two rooms in the building where the case was tried. Former auditors and bookkeepers after examining the books and intialing them testified that they were the books and records of the company "*and all such books and records of which they had any knowledge.*" The court admitted in evidence the testimony of two expert accountants, each of whom testified that he had examined *all* the books and records of the company. The court held that it was not essential that the two hundred fifty volumes of accounts be actually introduced, but, it was carefully noted in the opinion, at page 444:

"Before such testimony was given, as appears

> from a colloquy in open court, it was in substance agreed that because the records were so voluminous they need not preliminarily be brought into the courtroom, that they should continue to be held in the rooms referred to, accessible to all parties, that if required the witness should in giving his testimony specify the volume relied upon, and that if, at any time, any book was desired, it would be brought into the courtroom."

Vastly different is the case at bar where, it must be conceded, the books of account present in court were not all of the records of the corporation and were not those records by virtue of which the alleged expert Null could verify his statements.

In the *Stephens* case, moreover, it appeared that one of the accountants gave certain testimony to the effect that certain items of stocks and bonds were carried as assets at highly excessive overvaluations. Null, too, it will be remembered, attempted to place a valuation upon the Saunders franchise agreement and upon the expenses of organization and financing, by which he cut the assets of the corporation several hundred thousand dollars. In the *Stephens* case this court said at page 445:

> "But it appears that he was not only a trained accountant in the strict sense, but that he had had long and wide experience in connection with business where it was necessary to observe and place valuation upon such securities, and, as he put it, he followed the same course in his case in resorting to sources of information touching value 'as I have done all my life in valuing securities'."

Even as to a man so qualified this court said that "the propriety of receiving his testimony in this respect is not entirely free from doubt." Null on the other hand, testified (384): "I said that the franchise in question had no value whatsoever, but I couldn't answer the question as to whether or not the franchise did have a value at the time the original entry setting it up on the books was made." Again he said: (385) "In an operating going concern such as the Saunders Stores a franchise concession has value when it is in use. * * * As to the value of the franchise, I am afraid I could not answer, as I have already said, it had no value and I will have to stick that." And he admitted that any statement he would make would be a long, haphazard estimate, saying in response to the question, "Have you had any merchandising experience?" "I have never owned a grocery store or any other kind of store" (389).

This court, in the *Stephens* case, even regarded it as serious that there was no direct testimony that the books stored in the two rooms and identified by the former employees were the identical books inspected by the witnesses, and the court said at page 444:

> "But as we construe the objections interposed they do not evince any intention on the part of defendants to raise such a question * * * and an inference of such identity would not be unwarwranted."

How different is the case at bar where Mr. Null stated: "The basic books, records and memorandum which underlie that financial statement are not in court, and since the trial opened they have not been in court, that is, not all of them." Note, too, his statement in referring to the books which were present in

court: "In other words, in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369).

Another case in which it was held that an auditor may testify as to what is disclosed by books of account, although the books may not have been introduced in evidence, is *Butler v. United States* (C. C. A. 10), 53 Fed. (2d) 800. In that case, however, the court, in speaking of the action of the trial judge, said at page 805:

> "The court amply safeguarded the rights of the appellant by requiring the government to furnish him for the use of his counsel and auditor, a copy of the audit; by assuring appellant access to the books, *which were in the court room,* for the purpose of checking the audit; and by affording ample opportunity to cross-examine."

In the case at bar, it will be recalled, the two hundred seven page audit, of which Exhibits 89 and 90 were a part, was in the possession of counsel for appellants for a few hours, no copy being required to be furnished and all of the books not being available.

Furthermore, the court said at page 806:

> "There was no objection at the trial to the sufficiency of the identification, nor is error assigned thereon. * * * No assignment of error being directed to the identification of the books, the bill of exceptions properly omitted a colloquy between court and counsel, which is set out verbatim in the brief, *and in which further identification was waived.*"

In *Krotkiewicz v. United States* (C. C. A. 6), 19 Fed. (2d) 421, one of the grounds of appeal claimed

by the appellant was that error was committed in admitting in evidence *the books of defendant's company* and the testimony of an expert accountant based thereon. The court said at page 425:

> "The ground of this is that the books were not properly identified or authenticated as the records of the company's business, or shown to have been kept by or under the supervision of defendant. * * * The books, with perhaps one exception, were in the court room, and a later witness, Roseroot, testified that he was employed by defendant (who, as the records shows, owned more than 95 per cent of the stock of the company) to open the books; that 'I was in charge of those books until about the end of 1923 * * * until the time of the bankruptcy' (the scheme having been devised and executed, as claimed by the government, in the early part of 1923), and 'as far as I know those entries in that book are correct.' This testimony was apparently accepted by both parties as a sufficient authentication; the defendant did not thereafter renew his motion to strike the books from the record as evidence."

The court concluded its opinion with this significant language at page 426:

> "While authentication might have been more complete than it was by the testimony of this witness, yet apparently both the government and the defendant thereafter thought it had been sufficient, and defendant is not now in position to claim that prejudicial error was committed in this respect."

In the instant case the original objection to each of the exhibits under consideration was based upon the

grounds that sufficient opportunity had not been accorded appellants to examine the sources from which the exhibits were made; that the books, records, data and memoranda that underlie the statements have not been introduced in evidence; that sufficient opportunity had not been accorded appellants to examine the sources from which the statements were made; that there had been no proper identification of the books and records which were in court; that there had been no attempt to produce the people who made the entries or anyone having personal knowledge of the facts; that there had been no showing that such persons were not available; that there was no underlying testimony as to the correctness or regularity of the entries; that the original entries were not in court; that the books and records are shown to be incomplete; that appellants had nothing whatsoever to do with the records which underlie the exhibits and that they were but pure hearsay as to appellants and not the best evidence of the facts shown to be adduced (367, 375). A motion was made to strike these exhibits upon the same ground urged in the objections (449). Appellants cannot be regarded, therefore, as having waived objection and failed to save the error as did the defendants in the *Krotiewicz* case.

Government's Exhibit 91 (and to a certain extent Exhibits 89 and 90) was inadmissible for another reason of controlling importance. This exhibit purports to show the financial condition of the corporation on September 30, 1930, with a summarized statement of the assets, liabilities and net worth or capital (378). The date of the offense as charged in the indictment is coincident with the letter in the first count to Mrs. Addie Driscoll, April 9, 1930 (Government's Exhibit 43) (273). On the date, therefore, the alleged offense was committed and completed because

it is the use of the United States mails which is the gist of the action in furtherance of a scheme to defraud, which, of course, must precede, and not succeed, the date of the offense.

To attempt to justify the admission of the exhibit upon any such ground as having a bearing upon the question of intent would be to ignore its admitted purposes and to disregard its obvious nature. It was introduced with the express object of proving the financial condition of the corporation on September 30, 1930, as a circumstance to be taken into consideration in ascertaining the truth or falsity of the representations. The statement, however, shows a condition almost six months after the date when the offense is alleged as having been committed and completed. Many circumstances causing a condition to exist on September 30, 1930, might well have intervened between that date and April 9, 1930. In times of economic disturbance and declining prices vast changes in asset and liability columns may occur in periods shorter than of six months' duration. The condition of the company as shown by a general balance sheet, on September 30, 1930, is literally no proof of the financial condition of the company six months earlier, or on April 9, 1930. The payment of the dividends took place in June and December of the year 1929, and if this exhibit be taken into consideration in connection with these events it is still further removed from the point of relevancy and competency.

A case exactly in point upon this subject is *Mandelbaum v. Goodyear Tire & Rubber Co.* (C. C. A. 8), 6 Fed. (2d) 818. The plaintiff sued for the difference between the price at which he sold his stock some time after he purchased it, and the price he paid for it, predicating his cause of action upon the ground that

he was induced to make the purchase upon false and fraudulent representations. The facts sufficient for consideration in this connection appear as a part of the opinion of the court as follows, at page 824:

> "The principal error assigned is that the court excluded evidence upon which plaintiff in error relied to show the falsity, not only of the specific representations made, but that the financial condition of the company generally in April, 1920, was not as represented. This evidence may be reduced practically to the reports made by Price, Waterhouse & Co., expert accountants, October 31, 1920, and later in 1921. The court excluded these statements as furnishing no proper index of the condition of the company six months before that time for several reasons. In the first place, these accountants were employed by the bankers who undertook to refinance and reorganize the Goodyear Company. Their object was to make a statement which would justify the safe investment of many millions of dollars by their employers. In so doing they made, naturally, a very conservative estimate of assets. In other words, to use a common expression, they cut them to the bone. They discounted all accounts and bills receivable that were not certain of ready collection and payment. Large losses did occur through the falling off of business and the decline in the price of raw materials. All these things explain in large measure, if not entirely, the difference in values appearing between the Goodyear statements of April, 1920, and the statements of the accountants made in the late fall of 1920 and the spring of 1921.
>
> "Furthermore, the court held that, in view of

> the great financial depression conceded to have taken place in the fall of 1920 and thereafter, a statement of the condition of the company at that time, conditions being materially changed, could furnish no safe guide from which the jury could determine the condition of the company in the spring and early summer of the same year. We think the court was right in so holding."

The result reached in the foregoing case is an inevitable application of the principle of evidence and of logic that, as to matters which do not possess the quality of permanence and continuation, there is no presumption that conditions existing at one point in time are the same or similar to those existing at an earlier point in time. In other words, a presumption in such cases does not run backwards.

The court in *Gold v. United States* (C. C. A. 8), 36 Fed. (2d) 16, used the same reasoning in considering an appeal and reversing a judgment of conviction under the Mail Fraud Statute. The court said at page 33:

> "Evidence of various kinds was allowed to be introduced tending to show a drop in the price of the stock of the Southern Minnesota Bank from May, 1925, to the time of the trial in November, 1927; the purpose of the evidence being to establish that the prices in May and June, 1925, were fictitious and caused by the alleged fraudulent representations. The evidence was plainly inadmissible. Many factors might have intervened to affect the price unfavorably, and the uncontradicted evidence in the case showed the existence of a number of such unfavorable factors after the sales in May and June, 1925. The ruling in

the *Mandelbaum Case* on a similar point is controlling here."

In *State v. Mobley,* 241 Pac. 155 (Okla. 1925), a petition was filed to set aside a deed as having been executed for the purpose of defrauding creditors, and in the trial of the cause plaintiff attempted to prove that the grantor was insolvent and had no assets out of which the judgment could be collected. The court said at page 157:

"The plaintiff alleges E. C. Mobley is insolvent, and called E. C. Mobley as a witness to prove his insolvency at the time of the trial.

"Under the rule announced by this court, it is not sufficient to prove the insolvency of the grantor at the itme of trial or when suit is brought.

"In *Oklahoma National Bank v. Cobb,* 52 Okla. 654, 153 P. 134, this court said: 'In an action to set aside a deed charged to be fraudulent as to creditors, it must be both alleged and proved, before the deed can be set aside, that at the time the conveyance was made the debtor was insolvent, and the fact that the insolvency exists at the time suit is brought does not raise the presumption that the debtor was insolvent some months prior to that time'."

In *Brenan v. Eubank,* 56 S. W. (2d) 513 (Tex., 1933), suit was brought to set aside a deed to a bank and to cancel a contract and note given by the purchaser, upon the ground that the bank was insolvent. The court said at page 515:

"The burden of proof was upon appellant to

establish prima facie every element essential to his cause of action based upon fraud. * * * In at least one of these essential elements, the falsity of the representation as to the value of the stock, the evidence wholly fails. * * * Appellant asserts: 'It was a question of fact for the jury as to whether a bank, insolvent in June, 1930, could have been solvent with stock worth 100 cents to 135 cents on the dollar in February, 1929.' This, we think, is a non sequitur.

"Even in normal times there is no presumption that a bank which is closed by the department for some undisclosed reason was insolvent sixteen months prior to the time of closing.

"Independently of this we think we may take judicial notice of general economic conditions; that the stock market crash which heralded the present 'depression' occurred in October, 1929; that in its wake numerous banks and financial institutions all over the country, which had theretofore been not only abundantly solvent, but in a flourishing financial condition, failed; that this was especially true of the smaller banks (that in question was capitalized for $50,000).

"The record is entirely silent as to the bank's assets and liabilities at the time it was closed in June, 1930. Equally silent is the record as to why the bank was closed, whether from some irregularity committed by the directors, or that its then liquid assets were insufficient to meet the requirements of the banking laws."

Likewise, in the case at bar, the record is entirely silent as to the assets and liabilities of the corpora-

tion under consideration at the time of, and prior to, the date of the completion of the offense, April 9, 1930. Profit or loss from operations, of course, does not determine assets, liabilities or net worth. It will be seen from the balance sheet of September 30, 1930 (378) that the total *current* assets amounted to $426,012.03, while the total current liabilities were only $74,171.90. Null's computed deficit of $215,-378.47 was made possible, as has been said, only by giving to the common stock outstanding, *of no par value*, a liability aspect in the sum of $405,014.50. It was testified by Null that at the time the company went into receivership only $7,609.25 worth of claims were presented by the creditors and the total general accounts payable, and not all immediately payable, were less than $19,000 (389). No argument need be addressed to this court to the effect that the items of cash, accounts receivable and merchandise inventory in the asset column and the items of accounts payable in the liability column are subject to important and rapid changes over a period of six months.

In *California Credit & Collection Corporation v. Bernardini*, 246 Pac. 824 (Cal., 1926), action was begun against the defendant for the balance of the purchase price of corporate stock sold to him. Payment was resisted upon the ground that the execution of the note evidencing the indebtedness of the balance due upon the purchase was obtained through fraudulent representations. The defendants sought to introduce evidence of the value of the stock a year and a half subsequent to the date of the note. The court, in sustaining the action of the trial court holding such evidence inadmissible, said at page 825:

> "There was no evidence offered whatever to show the condition of the company's affairs or

> the value of said stock in the open market prior to or at the time of the making of such representations, or the actual value of said stock at any time. We are not prepared to say, therefore, that the evidence is legally sufficient to warrant this court in nullifying the finding of the trial court to the effect that appellant failed to prove the falseness of said representations."

In *Ellis v. State*, 119 N. W. 1110 (Wis., 1909), the defendant was convicted of receiving a deposit with knowledge that his bank was unsafe or insolvent. The trial court admitted evidence with reference to financial condition of debtor's bank, after the suspension and without proof that the same condition existed at the time of the occurrences charged in the indictment. In reversing the case the court said at page 1114:

> "It is an elementary principle of evidence that, as a general rule, presumptions do not run backward; that while 'when the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question" *(State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; Greenl. on Evidence, Sec 41), *there is no retroactive evidentiary inference, especially reaching backward materially.*"

Another application of the same principle appears in *Rardon v. Davis*, 52 S. W. (2d) 193 (Mo. 1932). This was an action for fraud in the sale or exchange

of bank stock and cash for the plaintiff's stock of general merchandise. Over objection the trial court allowed the plaintiff to show that on many of the notes very little or nothing could be collected at some unknown time after the exchange. The court said at page 195:

> "It is not sufficient proof of the insolvency of the notes at the time of and before the exchange was made, to show merely that they could not be collected at a subsequent time. *Akin v. Hull*, 222 Mo. App. 1022, 9 S. W. (2d) 688. The trial court should be careful to admit only competent testimony tending to show the value of the assets at the time of the exchange."

In *Davidter v. Ash*, 249 N. W. 886 (Mich., 1933), a verdict was directed against the plaintiff in an action for damages for fraud in the sale of securities. The entire opinion of the court is as follows:

> "The measure of damages in such case is the difference at time of sale in value of the securities as they were represented and as they were. On this matter plaintiff was put to proof and failed; the only evidence worthy of note being that some months later a receiver was appointed for the corporation issuing the securities. This was insufficient to support an assessment of damages, as the trial court correctly held."

There is abundant, additional precedent announcing the principle illustrated by the foregoing cases, but it is believed that a further presentation of the authorities is unnecessary in support of a doctrine which so comports with logic and common sense.

No matter with what care the authorities may be

investigated and exhausted, no case will be found, it is submitted, in which evidences such as the Null summaries was received, where the defendants were affirmatively shown to have had no connection with the underlying books and records, where all of the supporting data were not identified and not in court; where such books as were in court were themselves but summaries and not sufficient to enable the witness who prepared the exhibits to testify to their correctness; where even those books which were present in court were not identified at all for the first ten months' period of the corporate existence; where none of the books and records were offered in evidence; where but a few hours were accorded the defendants to test the sufficiency and the accuracy of the exhibits and to prepare for cross-examination; where the one witness, whose identification of the books of account was all-important, himself admitted the making of at least one substantial, fictitious entry, and where the defendant offered to show that such witness was a self-confessed manipulator and embezzler.

To confirm the action of the trial court in admitting these exhibits, under the circumstances at bar, would be, it is respectfully submitted, to remove the last vestige of protection to a defendant confronted with such testimony and would render obsolete and meaningless the requirement that the government must prove its case, in every important aspect of the offense, beyond a reasonable doubt.

III.

GOVERNMENT'S EXHIBITS 109 AND 110. BEING INCOMPLETE MEMORANDUM CARDS KEPT IN THE OFFICE OF THE COLLECTOR OF INTERNAL REVENUE FOR ARIZONA, PUR-

PORTING TO CONTAIN CERTAIN FIGURES OR SUMS COPIED FROM THE ORIGINAL RETURNS OF THE CORPORATION, WERE ERRONEOUSLY ADMITTED IN EVIDENCE (Specifications of Error 7, 8).

After Brandt had admitted the important, fictitious entries in the books of account and enough had been revealed to cast suspicion both upon him as a witness and upon the books themselves as exact and truthful records, and after the various witnesses had testified that the books and records underlying the so-called Null summaries were not even in court or identified—far less introduced—the prosecution succeeded in introducing in evidence Exhibits 109 and 110. These were informal cards kept in the office of the Collector of Internal Revenue for Arizona and containd certain bare and unsupported figures purporting to be the losses of the company from its operations during the years 1929 and 1930.

Upon Exhibit 109 appear two figures, one after the words "Gross Income"—$125,588.45, and after the words "Net Income" appears the following, "Loss $150,271.53." These totals appear under the column "1929." In the spaces for the name of the president and of the treasurer appear question marks (442).

Exhibit 110 is a similar memorandum card and in the line for the name and address of the taxpayer appears "United Sanders Stores, Inc. (formerly Ariz. Clarence Saunders Stores)," after the address, the date of organization appears as November 23, 1928, while on the previous exhibit, 109, the date of organization appears as October 25, 1928. The space for the name of the president is left blank and George J. Erhart is indicated as the receiver. Under the column

1930 appear the figures after the item "Gross Income," $306,054.21, and after the item "Net Income" appears "Loss, $135,626.67" (446).

A glance at the exhibits is enough to disclose their incomplete and unsupported character. The names of the officers are not disclosed; the figures from which the totals were calculated do not appear and the name of the party making the computation is not indicated.

The obvious purpose of these documents was to prove that the company had operated at a loss, contrary to the representations of the defendants, and that the corporation, by some representative, had stated such loss in its original income tax returns. If such statements by the corporation, or upon its behalf, were otherwise admissible, as it will be seen they are not, it is immediately apparent that the statements themselves are the best evidence thereof and this requires that the original returns be produced, if available, and, if not, that copies authenticated as required by law be offered in lieu of them. The originals were on file at Washington, D. C. (438), but no attempt was made to procure them or to procure authenticated copies which are expressly made available in cases in which the government is interested.

Section 1, Article 1091, Regulation 62 of the Treasury Department.

In a case decided by this court, *Gibson v. United States* (C. C. A. 9), 31 Fed. (2d) 19, it was held that a Deputy Collector of Internal Revenue is incompetent to waive any right relating to the examination of income tax returns. The court said at page 22:

"By a rule of the Treasury Department (Reg-

> ulations 69, Art. 1091; Treas. Dec. 2962; in re *Epstein* (D. C..) 300 F. 407; Id. (C. C. A.) 4 F. (2d) 529, it is provided that upon the written request of the Attorney General, or one of his assistants, an income tax return or a copy thereof may be furnished by the Commissioner to a United States attorney for use as evidence in any litigation in court, where the United States is interested in the result. Or, if the return is in the possession of a collector, it may, upon the conditions stated, be furnished by him."

It would seem to be self-evident not only that the original of a document is the best evidence of its own contents, but, also, that where such original is on file with some governmental custodian, a copy certified to, or authenticated by, such custodian would be the next best evidence of the contents of the instrument. Copies of the original income tax returns, duly authenticated, were readily available. As the court said in *In re Epstein* (C. C. A. 6) 4 Fed. (2d) 529, 530:

> "The question whether this certified copy of this income tax return can be introduced in evidence upon the examination of the bankrupt, is fully answered by Section 1 of Article 1091 of Regulation 62. That section provides among other things that the original return, or a copy thereof, may be furnished by the Commissioner of Internal Revenue to the United States attorney for use as evidence before the United States grand jury, or in litigation in any court where the United States is interested in the result * * *"

In *Lewis v. United States* (C. C. A. 9), 38 Fed. (2d) 406, the proper method of introducing evidence with reference to income tax returns is disclosed. The court said at page 413:

> "A certified copy of the income tax return to the United States Internal Revenue Department for the year ending March 31, 1924, was introduced in evidence. This return showed a loss of $378,000 for the year. Another return for the calendar year 1923, that is, the year ending January 1, 1924, signed by the appellant, Lewis, showing a loss of $396,000, was also received in evidence. These returns made to the government, purporting to show the condition of the company, were properly received in evidence, without other proof than the certificate of the governmental custodian thereof. 28 USCA Sec. 661, Rev. St. Sec. 882; *Lewy v. U. S.* (C. C. A.) 29 F. (2d) 462, 62 A. L. R. 388."

Mr. Roy M. Davidson, the acting collector under whose testimony these exhibits were introduced, first refused to testify under instructions from Washington. He returned the following day and announced that he had a telegram from Commissioner Helvering authorizing him *to testify.* The telegram was introduced in evidence without any foundation other than the statement that it had been received (437). It is to be noted that there is no consent or permission granted to Mr. Davidson in the telegram to disclose any government records, the authority being merely "to testify."

Thereupon, this witness stated that Exhibits 109 and 110 were cards kept in the regular order of business in connection with the returns of the company and, over objection, they were received in spite of the fact that Mr. Davidson conceded on his Voir Dire Examination *that he did not know anything about the entries upon the cards, nor whether they were true or correct, nor even whether they had been correctly*

copied from the returns (439). The sum-total of Mr. Davidson's testimony was that he knew that returns had been filed and that these cards were regularly kept and filed in his office. All of this is the exact equivalent of permitting Mr. Davidson to testify that some one whose name he did not know or whose connection with the company he did not know, had made a statement to some one in his office which he hadn't heard or seen, and that the employee had jotted down the memoranda which Mr. Davidson couldn't say were correct, in the routine of the business, which jottings are offered in evidence as competent and material proof that the company had suffered losses. It could only have been in utter desperation over the weakness of the foundation for the Null summaries and the disturbing thrust at Brandt that induced the prosecution to tender evidence of this nature.

Even if the corporation making the returns were a party to litigation, or if appellants had directed or sponsored the filing of the originals, these incomplete cards would be inadmissible.

In *Corliss v. United States* (C. C. A. 8), 7 Fed. (2d) 455, the court condemned the intrdouction of copies of income tax reports, some of which were identified by a former bookkeeper, and all of which, probably, had been sworn to by the defendants against whom the exhibits were offered. The defendants were indicted under Section 215 of the Penal Code, as in the instant case, and were charged with the making of false representations, one of the principal of which was to the effect that the company had paid, and would continue to pay, dividends. Having the burden of proving that such representations were false within the meaning of the Mail Fraud Statute, the Government introduced the testimony of

an expert accountant who stated that during the time the company had sold the stock and paid dividends it had been operated at a loss. To fortify the testimony of this accountant the copies of the income tax returns were introduced. Notwithstanding the existence of the other evidence in the record, the court promptly determined that the receipt in evidence of these copies, although only cumulative, was, in itself, flagrantly prejudicial error. The court said at page 457:

> "The most important evidence in support of the government's case consists of six exhibits purporting to be copies of income tax reports made by the company to the government. Three of these were identified by a former bookkeeper. The other three were wholly unidentified. These documents were received in evidence over properly framed objections by defendants. The papers were presented by the prosecution for the purpose of showing that defendants had made sworn statements to the government which demonstrated that the company's business was not prosperous but was conducted at an annual loss. The instruments on their face showed that they were copies. Before they could be received in evidence, the fundamental rule required the government to show that the original documents could not be produced. Greenleaf (15th Ed.) Sec. 82, 84; Stephens, arts. 64, 65. The very nature of the papers proved that such a showing could not have been made. The originals were in the custody of the Government, and, under the statute of Congress, were available whenever needed in court. Act Feb. 24, 1919 (40 Stats. at Large, 1086, Sec. 257 Comp. St. Ann. Supp. 1919, Sec. 6336 1/8x), and Regulation of Treasury

> Department, art. 1090. These copies are not signed. Witnesses were allowed to testify as to who signed some of the originals. A more flagrant violation of the best evidence rule could hardly be conceived. *This evidence goes to the very center of the government's case.* The rule requiring a document to be proved by its own production, and not by copy, and the rule which requires the production of the best evidence, both forbade the acceptance of these copies in evidence. For this error the case must be reversed."

The *Corliss* case, it is respectfully submitted, is completely determinative of this appeal.

In *Mohawk Condensed Milk Co. v. United States* (Court of Claims, 1930), 48 Fed. (2d) 682, the court refused to accept certified sheets containing totals and summaries of transactions which sheets the Comptroller General certified that he had received from the Federal Trade Commission. The court said at page 685:

> "There is no competent proof by the defendant to support the allegations of the counterclaims. The notices from the Comptroller General to the plaintiffs do not prove the correctness of the figures therein used. It appears that the Comptroller General's office obtained the figures shown in his notices from some one in the Federal Trade Commission, *but there is no competent proof as to who compiled these figures or how they were arrived at.* For the purpose of showing how the Comptroller General arrived at his figures the defendant offered in evidence certain sheets of paper containing certain totals and summaries which the Comptroller General

certified that he had received from the Federal Trade Commission. *No one who had anything to do with the preparation of these figures was called to testify as to their correctness or how they were arrived at.* The defendant claims that these documents represented an audit on the basis of the Federal Trade Commission cost accounting, as set forth in a pamphlet issued by the Federal Trade Commission, of July, 1917, entitled "Uniform Contracts for Cost Accounting, Definitions and Method." There is no competent proof of this. This court will not accept certified copies as proofs of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department, or commission. Certification of documents proves only the document itself, and permits its introduction in evidence without further proof of identification, *but such certification does not establish as a fact the correctness of the statements or figures therein contained.* When there is as here a controversy concerning the correctness of the contents of such documents, such contents must be proved by the party relying thereon the same as other facts. We cannot accept the sheets certified by the Comptroller General as proof of their contents or of the correctness of his determination."

In the opinion of the District Court in the *Epstein* case, *In re Epstein* (D. C. Michigan, 1934), 300 Fed. 407, which was affirmed by the Circuit Court of Appeals in the same case heretofore cited (4 Fed. (2d) 529), the court said at page 408:

"As testimony of the bankrupt concerning the

> contents of the tax return would be incompetent (because secondary) evidence thereof in the absence of a proper foundation therefor, and as the return itself was available for introduction, and therefore no such foundation could be laid, the question essentially involved is whether the trustee in bankruptcy is entitled to introduce such income tax return in evidence without the consent of the bankrupt."

The returns themselves, or authenticated copies thereof, would be but computations made from other sources and were not, in any sense, even secondary evidence. Inasmuch as they were in no respect the act or deed of appellants, they could not be received upon the theory of an admission. If the persons signing such return and familiar with the contents were not actually made available for interrogation by a defendant against whom it is offered, he is rendered completely helpless and is placed at the mercy of the computations of a man whose name he does not even know.

A fortiori if such cards or memoranda are permitted in evidence against defendants facing grave charges with no opportunity to check the calculations, with no chance of looking at the original and deprived of the opportunity even of knowing the name of the person who made and signed the document, then all rules of evidence have no meaning and the burden of proof resting upon the Government is not merely lifted but is placed upon the shoulders of the defendant who, heretofore, has been said to be presumed innocent. Who can say that, in view of the baseless Null summaries and the tottering Brandt, the jury would have rendered the verdict it did if these exhibits, carrying the aura of governmental dignity, had been excluded?

It will probably be conceded that appellants had no knowledge of the returns or of their contents since there certainly was not a scintilla of evidence to that effect. Therefore, the returns themselves, had they been offered, would be but hearsay as to appellants. No authority need be cited to the effect that a statement made by a third party to a witness who is called cannot be testified to because it is hearsay.

The learned Judge, however, permitted these cards in evidence which contained figures copied from another document, as to which even the act of copying could not be vouched for as correct; such other document being made by a person unknown and, in turn, computed from books and records not introduced, offered, identified, present in court or described, nor even, so far as the record goes, known or ascertainable. This, assuredly, is hearsay thrice removed.

Attempt was made to qualify these exhibits as official public records carrying with them the import of verity, and in that connection the Government cited below, as it probably will upon this appeal, the case of *White v. United States*, 164 U. S. 100; 41 L. Ed. 365, in which the entries in a book kept by a jailer were held to be competent as a public record to show that the prisoner was in jail on a certain day. The witness stated that the book in question was kept by him as jailer, that the entries were made in his own handwriting and that he was required to keep such record. The defendant objected upon the ground that there was no law in Alabama requiring such a record to be kept and that it could only be used as a private memorandum to refresh the recollection of the witness. The objection was overruled and the witness permitted to read the entries from the book. The court said at page 103:

> "A jailer of a county jail is a public officer and the book kept by him was one kept by him in his capacity as such officer and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty is not material. So long as he was discharging his public and official duty in keeping the book it was sufficient * * *. It is obvious that the nature of the office of the jailer requires not only the actual safe keeping of the prisoners, committed to his charge, but that in order to the proper discharge of its duties some list should be kept by him or under his supervision showing the names of those received and discharged together with the date of such reception and discharge."

Here was a physical fact directly observed by the jailer and recorded in his own handwriting. Such a record would probably be admissible if made by a clerk whose duty it was to keep such book but in that case, too, the entries would be based upon actual participation or observation. Such, obviously, is not the case at bar.

The Government relied, also, upon the case of *Heike v. United States*, 192 Fed. (C. C. A. 2) 83. In that case, however, the records were official registers or dock books of assistant United States weighers, the entries in which were made upon personal observation. The court said at page 94:

> "It is contended that there was error in admitting certain dock books of the assistant United States weighers. In these were recorded by such assistant weighers the results of their observa-

> tion of the scales made at the time of weighing. These were official records of the Government and produced from its files * * *."

The court said, further:

> "They are official registers or records kept by persons in public office in which they are required either by statute or by the nature of their office, to write down particular transactions occurring in the court of their public duties or under their personal observation."

The facts sought to be shown by exhibits 109 and 110 were ultimate facts, namely, losses suffered by the corporation. Such ultimate facts could only be observed by a Government employee through and by means of an actual examination of the events which resulted in such losses as reflected by regular, exact and complete entries appearing in the books of the corporation.

Cases such as *White v. United States* and *Heike v. United States* hold only, and properly, that public records are admissible when made by recognized and designated government agents, regularly recording facts observed or acts performed by them in the course of their duties and at the time of observation or performance. The jailer saw the prisoner and the weigher conducted the weighing process. The original returns from which the figures in Exhibits 109 and 110 were taken *were not made by the Government* but by the tax payer, a private citizen or corporation. While such returns may become part of the public files, they do not constitute a public record within the meaning of the rule. Were this not true, any document filed with a governmental agency would be admissible in evidence as proof of a fact no mat-

ter how inaccurate or even how tainted with perjury. The exhibits, as has been said, merely attempted to copy, incompletely, papers so filed without even the support of testimony claiming correctness.

The unknown signer of the original returns may have been the invisible witness who convicted these appellants.

IV.

APPELLANTS' CROSS-EXAMINATION OF TOM H. BRANDT WAS UNDULY RESTRICTED AND THEY WERE ERRONEOUSLY PREVENTED FROM DEMONSTRATING, BY THE INTRODUCTION OF EVIDENCE, THE INCREDIBILITY OF THE TESTIMONY OF THIS WITNESS WHOSE IDENTIFICATION OF BOOKS AND RECORDS, AND WHOSE TESTIMONY OTHERWISE, WAS ESSENTIAL TO THE GOVERNMENT'S CASE. (Specifications of Error 9, 10.)

It is entirely conceivable, nay, probable, that the verdict of guilty would not have been rendered had appellants been permitted to cross-examine Tom H. Brandt to a reasonable extent and to a natural conclusion. He was the witness upon whom the prosecution mainly relied in identifying corporate books of account, stock ledgers, minute books and signatures, in testifying to conversations respecting dividends and in other important aspects of the case. He was called and recalled by the Government six times during the trial and his testimony covers page after page of the transcript (Transcript of Record 251, 261, 267, 324, 391 and 411). Without Brandt there would have been practically no identification of the books of account and, accordingly, no foundation for the

Null summaries (Exhibits 89, 90 and 91) and, consequently, no proof (excepting as to the income tax cards) of the alleged falsity of the representations and no evidence of conversations respecting the dividends. He may be termed the one, indispensable, Government witness.

If it could have been demonstrated to the jury that he was a self-confessed embezzler of the funds of the very company he testified about, that he was guilty of a criminal breach of trust, that, by sly and underhanded methods he was dipping his fingers into the treasury *and had abstracted $5,000.00 within one month of his appointment as treasurer of the company,* is it possible that that degree of credence would be accorded to his bookkeeping entries as to enable the court to say that there exists that kind of a circumstantial guarantee of faithfulness to truth as would permit a conviction to stand based largely upon expert summaries taken from entries inscribed by the hand of such a manipulator? He was appointed treasurer of the company *on June 24, 1930* (248) and he had checked out $5,000.00 of the corporate funds, placed it in the account of the Phoenix Packing Company and had withdrawn $2500.00 of this amount for his own use *on July 1, 1930* (422).

Brandt became employed by the company about September 15, 1929, when he acted first as ledger man, and then became, what he termed, its comptroller, which position he held until August 7, 1930 (251). He then identified Government's Exhibits 34 to 39 for identification (books of account) saying that the entries therein were made by himself and other parties with whose handwriting he was familiar (252). He said: "Insofar as the entries in these books which I have identified are concerned, I would

say that they are true and correct insofar as my supervision extended" (253). It may be observed, in passing, that he testified that at that time the accounts which eventually blended into the general ledger were missing; that the pay-roll was missing; that the detail information accumulated through the journal and cash records were not present; that the accounts receivable ledger was not present and that the monthly trial balances which were taken were missing.

He testified, further, that "I cannot say that prior to September 15, 1929, the entries are true and correct as they were not made under my supervision, nor could I say that the entries made in the general ledger from early August, 1930, on, are true and correct" (255).

He testified as to the signatures of Mrs. Loveland, A. E. Sanders and Gus Greenbaum on a number of letters and documents which were later introduced in evidence (268). He identified commission checks and subscription ledger (324) and then proceeded to relate alleged conversations with Gus Greenbaum, one of the appellants, with respect to one of the most serious charges in the indictment, namely, the payment of dividends. In this connection his testimony and his conduct revealed by Government's Exhibits are sharply at variance.

Upon interrogation by counsel for the Government, he said that in December, 1929, he had a conversation with Mr. Sanders in the presence of Gus Greenbaum and that, although he couldn't remember the details of the talk the substance was that defendant, A. E. Sanders, told him to prepare dividend checks on the preferred stock. He testified that he told Sanders that the corporation had no earnings and

that they had nothing to pay the dividend from (329, 330); that he brought in a record showing the operating loss and "there was a discussion as to whether or not there was in fact a loss." Apparently appellant, Gus Greenbaum, took no part in this conversation, nor is it indicated that he was at that place in the office where he could hear what was said. Brandt testified "*I don't remember that Gus Greenbaum said anything at that conversation*" (330).

Then came some surprising testimony. Brandt stated that the company as of December 31, 1929, the same month of the alleged conversation, the company did have approximately $51,000.00 in cash on hand and he said that Government's Exhibit 40, a statement of financial condition of the company on December 31, 1929 *was prepared by him and that it was correct* (333). Thus the same witness who testified the company was not in position to pay dividends and had no funds with which to pay them, himself prepared Government's Exhibit 40 (335) which shows that on December 31, 1929, the company had on hand $51,326.72, in cash, more than twice enough to pay the dividend (380, 381); $70,974.05 of accounts receivable, inventories in the amount of $251,400.93 and investments and securities in the amount of $113,100.01. According to this statement by Brandt the total current liabilities were only $117,458.33 and there was a surplus of $33,780.46 with a total net worth of $884,190.46. The pretended statement of operating loss which the witness said he showed to Mr. Sanders was not introduced in evidence or accounted for, nor was it even described.

Brandt testified, also, that in June, 1930, he had a discussion with Gus Greenbaum while Mr. A. E.

Sanders was in Kansas, during which conversation this appellant is supposed to have said that the dividend for June must be paid. He said that he didn't recall any other conversation but that the dividends were paid and that Gus Greenbaum made a loan to the company of about $8,000.00 to assist in the payment. He said that at this time "we still didn't have any earnings and didn't have any money to pay these checks with" (330). Here again the Government Exhibits demonstrated an utter inconsistency between the words of the witness on the stand and his recorded acts. In Government's Exhibit 22 appear the minutes of a meeting of the board of directors held August 7, 1930, (248-250) at which were present A. E. Sanders, K. C. Van Atta and G. C. Partee. The financial statement of the company as of June 30, 1930, the dividend date, was presented by the president and shown to have been prepared by Mr. G. C. Partee, a witness for the Government, and approved by this same witness, Tom H. Brandt. This financial statement shows cash on hand and in bank in the sum of $45,334.37, with accounts receivable and merchandise inventories, at cost, making a total of $446,272.13. The statement shows, further, a surplus of $185,392.60. The correctness of this document is shown by the following certification which is appended to it (250):

> "I hereby certify that I have examined the books and records of United Clarence Saunders Stores, Inc., as of June 30, 1930; that the foregoing balance sheet is an agreement therewith, and that, in my opinion said balance sheet correctly reflects the financial position of the company as of that date."
>
> Signed: John W. Wagner,
> Certified Public Accountant.

In addition to these obvious inconsistencies, Brandt, after having testified that the books and records present in court were true and correct, proceeded to make the damaging admission that he had made an important, fictitious entry in the books of the company. He said that "Under the promise of A. E. Sanders in Kansas to get funds here, I made a fictitious entry and I showed it as a check to the Phoenix Packing Company for $5,000.00 and on the duplicate voucher I showed a charge against the Kansas Unit and put $4,400.00 in the Citizens Bank at Five Points, because on June 30th we had to make a return to the Corporation Commission on the sale of the stock and it required that the money be put up there" (418). Even this testimony as to the nature of the fictitious entry was a provable falsehood. On cross-examination he said "*I didn't cause that withdrawal to be made* from the Saunders Stores and the Packing Company account for a personal purpose of my own * * * I stated $4,400.00 out of the $5,000.00 went to the Citizens State Bank (416) * * * I didn't say that I had taken some of the Phoenix Packing Company money which I got from Saunders Stores and put it to my own account, and *I didn't do that*" (417). Counsel for appellants then had him identify his signature to Defendants' Exhibit E for identification and offered the same in evidence. This statement, consisting of eleven typewritten pages with reference to this shortage of $5,000.00, shows that Brandt drew a $2,000.00 check on the Phoenix Packing Company account payable to himself and another check of $500.00 and another of $100.00, also payable to himself, the $2,000.00 check being deposited in his personal account in the Commercial National Bank of Phoenix and the $500.00 check to his personal account in the Valley Bank at Phoenix. The

statement contains, also, the following questions and answers (419):

"Q. What is the extent of that shortage?

A. May I answer you in a different way? The extent of the shortage was $5,000.00 taken from the United Clarence Saunders Stores and deposited to the account of the Phoenix Packing Company and from which I have checked out $2,500.00.

Q. *To yourself?*

A. *Yes sir.*

Q. How did you get that $5,000.00 out of the United Clarence Saunders Stores into the Phoenix Packing Company, by what means?

A. We made our checks up in duplicate, and the original check showed payable to the Phoenix Packing Company $5,000.00. The duplicate showed United Clarence Saunders Stores, and the explanation was 'advanced to the Kansas unit'. That was charged into the United Clarence Saunders Stores account as organization and development expenses.

Q. In how many transactions or checks did you take this $5,000.00.

A. One.

* * * * * * * * *

Q. Then another check for traveling expenses appears on the 24th of July for $100.00?

A. No.

Q. *You took that upon yourself?*
A. *Yes.*

Q. Can you make this money good, Tom?

A. I think so, I couldn't possibly do it all at one time" (420).

The offer of this exhibit on the part of defendants was refused by the court.

In this position the witness, in trepidation over the matters with which he was being confronted, testified, further, that he left the company in the early part of August, 1930, but that he didn't remember the exact date. Then he said he did remember that the record would show it was August 7, 1930. He said, at one point, that he didn't have any particular reason for remembering the exact date and later that he might have had reasons for remembering that date (405). He said, too, that he was not accused of anything by Mr. Sanders on August 7, and later that he was accused of something on August 7 by somebody (407) and finally said that as a matter of fact, instead of resigning, he was discharged.

Brandt was not even accurate in his confession. *Four* checks were shown to him, each drawn upon the Phoenix Packing Company account in the Valley Bank, payable to his own order and by him endorsed, the first being dated July 1, 1930, in the sum of $500.00, the second being dated July 2, 1930, in the sum of $2,000.00, and two being dated July 24, 1930, one in the sum of $100.00 and the other in the sum of $500.00. The checks all bore his endorsement (422, 423). These checks were offered in evidence and, after objection and considerable argument, the objection was sustained, the court limiting the cross-examination and preventing the complete demonstration of the character of the witness as to his veracity

and his general unworthiness to be entitled to belief. In restricting the effort of appellants to pursue the inquiry, the court said: "This witness has testified that one of the entries in that book is fictitious. *It strikes me that this satisfies your inquiry.* Make your avowal" (425).

Thereupon counsel for appellants avowed (425) that if permitted to ask the questions Brandt would testify that he had stated before witnesses that he was personally responsible for said shortage of $5,000.00, that he had embezzled the same and that $2500.00 thereof had actually been checked out to his own personal use; that said embezzlement was effectuated by duplicate checks and manipulation of corporate funds; that many of the books and records of the company were kept by the witness in his own home and not at the company office for the purpose of concealing his transactions, which books were not present in court; that he had taken the money from the company funds about the 26th or 27th of June, 1930, and that the withdrawal was charged against the Kansas Unit to organization and development expense. The court promptly sustained the objection to the avowal.

The inability of the trial court to see the importance to the defense of a reasonable opportunity to show additional false entries, to show how and where important books were kept and to show that they were kept by, or under the supervision of, a man guilty of a criminal breach of trust directly affecting both his testimony and the books and records which he had stated to be correct, is difficult to comprehend, especially in view of the fact that appellants had been subjected during the trial to the repeated,

evasive, contradictory, untruthful onslaughts of this witness.

The cross-examination of a witness is a matter of absolute right, one of its purposes being to bring out facts tending to discredit him by showing that his testimony in chief was untrue or biased. It is of the essence of a fair trial that reasonable latitude to that end be given to the cross-examiner, and the credibility of the witness thus put to test. The denial of this right is prejudicial and fatal error.

In one of the leading cases in the United States courts, upon the subject of cross-examination, *Alford v. United States*, 282 U. S. 687; 75 L. Ed. 624, the Supreme Court reserved a judgment of the Circuit Court of Appeals affirming a conviction for violation of the Mail Fraud Statute *(Alford v. United States*, (C. C. A. 9), 41 Fed. (2) 157). In its opinion the Court of Appeals had said, "the purpose of such evidence is to identify the witness and to some extent give proper background for the interpretation of his testimony. In this case, however, the counsel indicated his purpose to use the information for the purpose of discrediting the witness. It is part of the obligation of a trial judge to protect witnesses against evidence tending to discredit the witnesses unless such evidence is reasonably called for by exigencies of the case * * *. Here it was evident that the counsel for appellant desired to discredit the witness, without so far as is shown, in any way connecting the expected answer with a matter on trial." In reversing the judgment of the Circuit Court of Appeals, the Supreme Court, speaking through Mr. Justice Stone, said at page 691:

"Cross-examination of a witness is a matter

of right. The Ottawa, 3 Wall. 268, 271, 18 L. Ed. 165, 167. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood (cf. Khan v. Zemansky, 59 Cal. App. 324, 210 Pac. 529; 3 Wigmore, Ev. 2d ed. sec. 1368, I. (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; * * * *and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased,* (Tla-Koo-Yel-Lee v. United States, 167, U. S. 274, 42 L. ed. 166, 17 S. Ct. 855; King v. United States, 50 C. C. A. 647, 112 Fed. 988; Farkas v. United States (C. C. A. 6th) 2 F. (2d) 644; see Furlong v. United States (C. C. A. 8th) 10 F. (2d) 492, 494.

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing, 72 Vt. 334, 340, 47 Atl. 1074; Martin v. Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing

> that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

It is to be particularly noted that the Supreme Court establishes not only the right of cross-examination of a witness for the purpose of impugning his reputation for veracity in his own neighborhood, but clearly adds that another purpose is that facts may be brought out tending to discredit the witness by showing that his testimony was untrue or biased. The language of the court is in the conjunctive.

In a subsequent case, *Cossack v. United States,* (C. C. A. 9) 63 Fed. (2d) 511, this court closely followed Mr. Justice Stone's opinion. In addition to quoting at length from the opinion, this court made the following pertinent observation:

> "We cannot say that the jury would have convicted the appellant had it disbelieved Mrs. Totten's testimony."

In *Heard v. United States* (C. C. A. 8), 255 Fed. 829, the court said at page 832:

> "The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness.
>
> It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by

him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary's witness his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness."

By permitting counsel for appellants to go only as far as they did in Brandt's cross-examination and by the unyielding attitude of the Trial Judge, in his protection of this witness, it is more likely than not that, with the questions left asked and unanswered, the jury, in their lay conception of such matters, drew conclusions adverse to appellants. It might have been more advantageous to the defense had the court stopped the inquiry *in liminae* and had not permitted appellants to proceed to the point of denouement and then, at the crisis, shut off the examination. The trial court's action in this regard ran counter to the liberal rule pronounced by the Supreme Court.

V.

THE GOVERNMENT FAILED TO PROVE BY ANY COMPETENT EVIDENCE WHATSOEVER CERTAIN MATERIAL ALLEGATIONS OF THE INDICTMENT, AND FOR THIS ADDITIONAL REASON, ERRED IN OVERRULING APPELLANTS' MOTIONS FOR DIRECTED VERDICT. (Specifications of Error 2, 3, 14.)

All of the points hereinbefore urged, and in fact,

hereinafter to be discussed, were raised by timely objection and exception to the court's rulings and by the formal motion to strike each of the Government's exhibits and the testimony with reference thereto and to instruct the jury to disregard them (449). They were raised, also, by appellants' motions for directed verdict at the close of the Government's case and renewed at the close of all the evidence (449).

Fearing to place a further burden upon the time of the court, by separate treatment, appellants will group under this one division of the argument a series of grounds which seem to adjust themselves to discussion under one head, in support of the contention that the court erred in failing to direct a verdict of not guilty.

It can hardly be the subject of dispute that, as to certain material allegations of the indictment, the Government offered no proof whatsoever. In some instances the proof directly contradicted the allegations, and in some the evidence constituted a material variance from the indictment.

In the first place there was no identification of the signature of "M. Loveland" to Government's Exhibit 43, the mailing of which is pleaded in the indictment as the offense charged (13). During the trial the Government showed to the witness, Brandt, a batch of letters fastened together, which were referred to as Government's Exhibit 41 for identification which, under the court's instructions, were marked 41-a, 41-b, etc. (270). For identification purposes, the letter of April 9, 1930, was marked "Government's Exhibit 41-U for identification," following a series of letters of earlier dates. Brandt, who identified the

signatures to this batch of exhibits, failed to include Exhibit 41-U for identification, which was, nevertheless, received in evidence as Government's Exhibit 43 over the specific objection of appellants that it did not connect or tend to connect appellants or any of them with the offense charged; that appellants were not a party either to the mailing of the letter or to the letter which elicited that response; that it was incompetent, irrelevant and immaterial, so far as appellants were concerned, and that there was no adequate proof of mailing. This piece of evidence, vital to the offense,—indeed constituting the gravamen of the charge,—was not lawfully received.

It goes without saying that if there is no evidence, direct or circumstantial, that the appellants mailed, or caused to be mailed, the letter to Addie Driscoll (Government's Exhibit 43), then no offense has been proven. The court in its instructions said: "Without proof of the mailing of the letter of April 9, 1930, to Mrs. Driscoll, there could be no conviction in this case" (481). True, the postmark is prima facia evidence that the envelope had been mailed, but that does not answer the question as to who mailed the letter or caused it to be mailed. The point here involved has been directly passed upon in several cases. We will cite but one: *Freeman, et al. v. United States* (C. C. A. 3), 20 Fed. (2d) 748, 750.

As stated, Government's Exhibit 43 was originally Government's Exhibit 41-U for identification, and was part of a batch of letters originally marked Government's Exhibit 41 for Identification. The evidence wholly fails to establish the identification of the signature "M. Loveland" on this letter and, therefore, the court should have either sustained the objection to the introduction of the letter (273) or should

have stricken it upon motion (449), or should have granted appellants' motion for a directed verdict on that ground (Transcript 454, sub-division 18 of Motion for Directed Verdict). In omitting to identify the signature of "M. Loveland" on this letter, the Government failed to establish that the appellants mailed, or caused to be mailed, said letter. This is fatal, and under no theory can be termed "harmless error."

In many of the important events touching the organization and capitalization of the company, averred in the indictment as having been the result of the acts of all the defendants, including appellants, there was no proof whatsoever of appellants' participation. Thus, while it is alleged that the defendants organized and incorporated the company with a certain capitalization for the purpose of engaging in merchandising, (3) the Government's own proof denies the allegation. The defendant, A. E. Sanders, testified "I organized the Clarence Saunders Stores, Inc." (345). After testifying that something had been said by one of the appellants, which one he did not recall, about preorganization stock, Mr. Sanders said that his attorney, Mr. Bird, told them that if they wanted to do business that way they "would have to get some other attorney, that he was representing me and not them" (346). Mr. Sanders positively stated, moreover, that the "Company was organized in Nogales by me. Mr. Duane Bird prepared the papers" (346). Again, Mr. Sanders said, "I applied for the issuance of 151,000 shares of the common stock to me through my counsel, Mr. Bird. He was not counsel for the Greenbaums. Prior to meeting the Greenbaums I was in business and desired to extend it."

While the indictment charges that appellants par-

ticipated in the acquisition of the Saunders franchise agreement and in causing the issuance of 151,000 shares of the common stock of the company to A. E. Sanders in consideration thereof, and for the transfer of a certain option to purchase stores known as the Cashway Stores, the evidence, as has been seen, refuted the charge (349). In this connection Mr. Sanders' conflicting statements to the effect that appellant, Will Greenbaum, discussed the matter of the Saunders franchise with him, went to Memphis with him, saw Clarence Saunders with him and obtained the franchise, after which they returned to Arizona and organized the company was destroyed on cross-examination by his statement that *he did not remember whether or not appellant, Will Greenbaum, did go with him to Memphis.* Therefore his positive statement on direct examination which included four elements (1), the preliminary conversation (2), the trip to Memphis (3), the conference with Saunders and (4) the return to Arizona and the organization of the company, all a one-piece narative, was destroyed when he took back three out of the four elements of his testimony, namely the trip to Memphis, the conference with Saunders and the return to Arizona (352).

The indictment avers that it was a part of the alleged scheme that the defendants, including appellants, should issue to A. E. Sanders for the sum of $1.00 35,000 shares of the common stock, three-fifths of which the defendants, meaning all of them, sold to the persons to be defrauded for the benefit of all the defendants (5). Not only did the Government fail to prove this allegation, it was firmly denied by its own witness, A. E. Sanders, who testified that the 35,000 shares of common stock mentioned in the indictment were issued to him but were turned back

to the company intact and that none of the shares were given to the Greenbaums and that they never had anything to do with it whatsoever (356).

The indictment alleges that the defendants, including the five named, acted under the name Greenbaum Brothers and the Bond and Mortgage Corporation in selling and offering to sell the common and preferred stock and debenture bonds of the company by means of false pretenses (5). The evidence disclosed, however, that A. E. Sanders had no connection, direct or indirect, with the sale of the stock and that there was an outright contract under which appellants operated at an agreed and allowed commission, in which he did not participate (349, 350).

As to H. D. Sanders, it will not be disputed that he had nothing to do with the organization of the company or with the operations of appellants and did not join the enterprise until long after April 9, 1930, the date of the alleged commission of the offense. A. E. Sanders testified that appellants had nothing to do with the Piggly-Wiggly Holding Corporation or the U-Save Holding Corporation or any connection whatsoever with them, these companies having been organized by his brother, H. D. Sanders (350). He said, further, that the H. D. Sanders' appearance in the enterprise dated from the contract between United Sanders Stores, Inc., and the U-Save Holding Corporation (351), which was in November of 1930 (351, 352). Furthermore, Mr. Sanders testified that "The Bond and Mortgage Corporation stopped, as far as I know, selling or offering for sale, any of the capital stock or debentures owned by the company along in June or July 1930" (355). And, further, he said, "I don't think that the Bond and Mortgage Corporation and the Greenbaums had anything to do with the sale of any stock of the company

after the name was changed to United Sanders Stores, Inc." (357, 358). This change in name occurred November 1, 1930 (221).

The indictment alleges that it was further a part of said scheme that the defendants should and they did authorize and pay a semi-annual dividend of 8% on the preferred stock of the company, on June 29, 1929 (5). There was no evidence whatsoever of the payment of any dividend on that date or at any time approximating it. A dividend was paid as of June 30, 1930, a year later, but of this the defendants were not charged and it constitutes, of course, a distinct variance between the pleading and the proof.

As to those portions of the indictment respecting the organization or operations of the Piggly-Wiggly Holding Corporation, the name of which was changed to U-Save Holding Corporation, by the defendant, H. D. Sanders, and his associates, and respecting the acquisition of control by the U-Save Holding Corporation of the common stock of the company under consideration, and the removal of $100,000.00 of merchandise from Arizona to California (Transcript of Record 6, second and third paragraphs), there was not only a complete absence of proof as to participation in these events by appellants, there was direct and uncontradicted evidence to the contrary. With the advent of H. D. Sanders, appellants and A. E. Sanders came to a parting of the ways.

The record is utterly silent as to whether or not appellants and H. D. Sanders were even acquainted or had ever met. H. D. Sanders had his own ideas. His was the plan to consolidate the corporation in question with his company, with which appellants

had no connection, and according to the Government's evidence he announced to the stockholders of the company the men who would be his associates—and they did not include appellants, nor has there been, nor will there be, any claim by the Government that the lives, or the intent, or the activities of appellants and H. D. Sanders touched at any point. Mr. G. C. Partee, one of the Government witnesses, so notified the stockholders on October 6, 1930 (281).

There is, and there can be, no room for doubt, therefore, that if the acts of the defendant, H. D. Sanders alone or with his associates, were unlawful and constituted an illegal scheme in the furtherance of which the United States mails were used, such conduct is not chargeable against appellants. Consequently, since there was no proof of any act or intent of theirs with reference to these transactions, the admission of evidence that such transactions occurred as the result of activities of others, when appellants alone stood trial under an indictment charging them with participation must, inescapably, constitute grave and prejudicial error.

In connection with the events, which for the purpose of convenience have been termed the "H. D. Sanders Events," many letters and announcements were received in evidence, over objection, read to the jury and considered by them in determining the guilt or innocence of appellants when, in fact, there was not a scintilla of evidence tending, even remotely, to connect appellants with them. This is true of a form letter dated July 21, 1930, signed by K. C. Van Atta, a Government witness, advising stockholders that "our volume of business is beyond any figure that we had anticipated with each month showing a substantial increase." (Exhibit 52, Transcript of Record 279.)

It is, also, true of Exhibit 53 (280), a mimeographed letter to stockholders signed by A. E. Sanders calling their attention to a stockholders' meeting to be held November 1, 1930, and indicating the cancellation of the agreement to pay Clarence Saunders one-half of one per cent. on the gross volume of business, which percentage "amounts to about $10,000.00 a year," thus indicating a gross volume of business of two million dollars annually.

The notice to stockholders, dated October 6, 1930, Government's Exhibit 54 (281), has already been refered to as announcing the plan to consolidate with H. D. Sanders Company, giving glowing pictures of H. D. Sanders and his associates—among whom is named the defendant, A. E. Sanders—and in which the payment of interest and principal on debentures and dividends on preferred stock is guaranteed. As to this exhibit there is no claim that appellants bear any responsibility.

The same considerations are applicable to Government's Exhibit 56 (289), a letter dated January 15, 1931, signed by H. D. Sanders, announcing the purchase or control of the corporation by the U-Save Holding Corporation and as to Government's Exhibit 64 (297), a form letter dated January 10, 1931, signed by Mr. G. C. Partee on behalf of United Saunders Stores, attached to which was a statement by a certified public accountant as of December 31, 1930, showing a net worth of $939,944.06 (299).

Such exhibits as the articles of incorporation of the Piggly Wiggly Holding Corporation of Yuma (212), or the certificate of amendment to its charter (213), the articles of incorporation of the Piggly Wiggly Southwestern Company (214), the letter

being dated July 9, 1927, long antedating the incorporation of the company under discussion, and the annual report of the U-Save Holding Corporation (219), as to which there is no pretense of connection with appellants, are so obviously inadmissible as to them that further comment with respect thereto is unnecessary.

No proof was offered as to the financial condition of the company at or prior to the date of the alleged commission of the offense, April 9, 1930, in support of the allegations of the indictment as to alleged fraudulent statements of financial condition. This point has been discused in full in a previous portion of this argument.

The indictment alleges that after the acquisition of control of the company by H. D. Sanders or the U-Save Holding Corporation, merchandise valued at more than $100,000.00 was removed from Arizona to Los Angeles (6). There was no proof whatsoever as to the removal of such merchandise as against any defendant but its influence upon the grand jury in returning the indictment cannot be computed nor, indeed, is it possible to tell that the jury before whom the case was tried, after listening for about one month to the reading of the indictment, to the introduction of one hundred ten exhibits, to the testimony of the witnesses and to the discussions of counsel, were able to remember whether the removal of the $100,000.00 of merchandise was merely averred in the indictment or proved as a fact.

To conclude this section of the argument, mention should be made of the fact that the indictment charges that the letter to Mrs. Driscoll, dated April 9, 1930 (Exhibit 43), the mailing of which is alleged

as constituting the gist of the offense, was mailed for the purpose and with the intent of executing the scheme to defraud, while the evidence shows that at the time said letter was mailed Mrs. Driscoll had already acquired her shares of stock and made no purchases thereafter. She testified "I bought no more stock after April 9, 1930, nor did I make any further payments on stock that I had already bought after I received the letter dated April 9, 1930." (293). Certainly the proof of the events after the mailing of the letter of April 9, 1930, which were charged as constituting a part of the scheme to defraud, in furtherance of which the letter was mailed, were inadmissible even upon the theory of proving intent. It cannot sensibly be conceived that the defendants devised a scheme to defraud in November of 1928, the date of the organization of the corporation, and contemplated at any time, although H. D. Sanders was not one of the 'designers', that he should, years later, acquire control and dispossess the company of its assets. Assuredly, also, the letter of April 9, 1930, cannot by any elastic stretch of imagination be regarded as having been mailed in furtherance of any such scheme.

VI.

THE GOVERNMENT ATTEMPTED, BY THE INTRODUCTION OF EVIDENCE, TO PROVE TWO DISTINCT SCHEMES TO DEFRAUD, IN ONE OF WHICH, IT WAS AFFIRMATIVELY SHOWN, APPELLANTS HAD NO CONNECTION WHATSOEVER. PROOF OF TWO OR MORE SCHEMES ALLEGED AS ILLEGAL ENTERPRISES IS NOT PERMISSIBLE UNDER ONE COUNT OF AN INDICTMENT. (Specifications of Error 3, 11, 12, 13, 15, 16, 17, 18.)

Considering the proof with careful reference to the indictment, it will be seen that if the first count under which appelants were convicted be taken, by some stretch of reason, *to plead* only one scheme to defraud, the Government, probably unconsciously adhering to its original conception of the case in seventeen counts, proceed, nevertheless, to introduce in evidence *proof of two unrelated adventures*, thus, as has been said, electing to adhere to the paragraphs relating to H. D. Sanders and to his U-Save Holding Corporation enterprise, and, by that same token, removing the possibility of regarding the paragraphs appertaining thereto as harmless surplusage. Even if this evidence did not attempt to prove two distinct schemes, it is just as fatally erroneous as if it did, because such evidence, assuredly, constituted proof of transactions adversely affecting the corporation and, especially since there was no showing of participation by appellants, it was obviously prejudicial to them in their defense.

Enough has been said heretofore with reference to H. D. Sanders, the U-Save Holding Corporation the acquisition of control of the corporation under consideration and the removal of the merchandise to apprise the court of the time and nature of these events. Suffice it to say here that there was nothing in the evidence or any intendment therefrom which connected appellants with H. D. Sanders, or which involved them directly or indirectly with the incidents which followed his appearance in the history of the case.

While there are some cases which hold that defendants charged with a criminal conspiracy need not, in order to make them liable, each take part in every phase of the venture, and that it is unneces-

sary, to render them culpable, that each has knowledge of the activities of the others. It has been said, too, that one defendant may later join forces with the project and thus become part of it and hence criminally responsible. But there is no such situation presented by the instant case. No conspiracy is charged.

From the very nature of the allegations of the indictment and the proof offered in support thereof, it is apparent that there can be no logical or possible common design in a scheme to obtain money from persons to be defrauded in inducing them to purchase stock by false pretenses and in a plan to obtain control of the corporation after it has been organized and has acquired assets and business and to remove those assets from the state and to induce stockholders who have been already persuaded to purchase, to surrender their shares in exchange for capital stock in a new corporation formed of a combination of four companies, as to three of which certain of the defendants had no knowledge or connection. The two ventures are unalterably inconsistent and it would be to ignore and evade the facts, to conclude by some legalistic sophistry, that all of the transactions charged in the indictment and all of the events attempted to be proved moved to a common, unlawful end.

Whether acting together or not, and with or without knowledge on the part of each person charged of the parts played by all of the defendants, or whether or not different means are used by different defendants, their acts and their intent must "ever lead to the same unlawful result." That cannot be said of the case at bar.

As this court said in *Terry v. United States*, (C.C. A. 9) 7 Fed. (2d) 28, 30:

> " 'If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment.' United States v. M'Connell (D.C.) 285 F. 164.
>
> "In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of lifetime. For these reasons the rulings complained of are erroneous and call for a reversal. Proof that the plaintiff in error was guilty of another crime was in itself prejudicial, and an instruction that he might be convicted of a crime not charged in the indictment cannot be sustained."

Undoubtedly in the case at bar there was no privity, under the evidence, between appellants and H. D. Sanders and his associates, nor did these parties act toward the same common end, but toward separate ends not even similar in character.

The Supreme Court of the United States, in speaking of consolidation of indictments, said in *McElroy v. United States*, 164 U. S. 76; 41 L. Ed. 355:

> "And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorized the joinder of distinct

felonies not provable by the same evidence and in no sense resulting from the same series of acts."

In *De Luca v. United States* (C.C.A. 2), 299 Fed. 741, the court, in reversing a judgment of conviction under an indictment charging the unlawful removal to evade duty on twenty cases of opium, which was consolidated with another indictment charging the sale of opium in a package not originally stamped, said at page 745:

> "Where different acts are provable by the same evidence, so that it is not possible to separate the proof of one from the proof of the other, they may be said to be connected. But there must be such connection in respect of time, place and occasion that it would be difficult, it not impossible, to separate the proofs of one charge from the proofs of the other. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. * * * This over act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. Furthermore, it appears from the record that the sale of 102 pounds of opium was wholly distinct and apart from the conspiracy. The 102 pounds which were sold as proven did not come from the 20 cases. We are satisfied that the two crimes were wholly distinct from each other. They were conceived and perpetrated at different times. While both groups of the defendants might be said to have a similar general purpose in view of trafficking unlawfully in narcotics, this does not justify the consolidation of the charges into one bill and a trial thereof at one time."

In *Tinsley v. United States*, (C.C.A. 8) 43 Fed. (2d) 890, the court, in speaking of the evidence introduced under an indictment charging larcency of horses and a conspiracy to commite larceny, said at page 893:

> "The law is well settled as to the introduction of evidence of other offenses in the trial of a criminal case, and this court has many times expressed itself thereon. If no question of a defendant's intent is involved, unless there is some connection between such offenses and those charged, it is manifestly unfair and unjust that evidence of life offenses to those charged in the indictment should be introduced. In Cook v. United States, 14 F. (2d) 833, 834, this court said: 'Evidence may not be admitted of other alleged crimes not related to the offense under trial, except where intent is an essential ingredient, or the subject of inquiry is so related to the main offense as to throw material light thereon'."

The evidence as to H. D. Sanders events can, of course, have no bearing upon the intent of appellants if, in fact, there was no connection between the parties and, as the evidence disclosed in the case at bar, no common design. To say that such evidence would be thus admissible, under the circumstances, would be to beg the question.

In *Coco v. United States* (C.C.A. 8), 289 Fed. 33, the court, in quoting with approval from McGehee v. State, 58 Ala. 360, said:

> "' * * * If two offenders be charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants

committed their several offenses at different times or places—in other words, that they are not guilty of one and the same offense—the proof does not sustain the indictment. * * * In the present case, according to the recitals in the bill of exceptions, each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial, each defendant was placed in legal jeopardy, and was entitled to have a verdict of the jury on the question of his guilt, in the absence of some statutory or legal ground, authorizing a nolle prosequi, or other withdrawal from the jury, that another indictment might be preferred, or continuance granted. * * * The defendants, having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, * * * cannot be again tried for the same offense.' "

Even as to a conspiracy, the court in *Wyatt v. United States* (C.C.A. 3), 23 Fed. (2d) 791, said at page 792:

"Having a responsibility for the enforcement in this circuit, not only of the National Prohibition Law, but of federal laws generally, we are strongly of opinion that the conspiracy statute should not be stretched to cover and be misused to convict for offenses not within its terms, and that, when resorted to, the conspiracy alleged must be proved as charged. When, as here, one large conspiracy is specifically charged proof of different and disconnected smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants,

> wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. Terry v. United States (C.C.A.) 7 F. (2d) 28, 30; United States v. McConnell (D.C.) 285 F. 164, 166."

In *Marcante v. United States* (C.C.A. 10), 49 Fed. (2d) 156, the court expressly approves and quotes from the opinion of this court in *Terry v. United States*, 7 Fed. (2d) 28. The court, after stating that a conspiracy is bottomed on an agreement to accomplish an illegal act, said at page 157:

> "On the other hand, there may be two or more conspiracies in the same state to violate the same law. If such be the case the government may not convict all the members of all the conspiracies under a charge of membership in one large conspiracy. To do so is to ignore the facts."

In *United States v. Siebrecht* (C.C.A. 2), 59 Fed. (2d) 976, the defendants were indicted for conspiring to misapply funds of the bank. The court said at page 977, in speaking of a first and second purchase by one of the defendants as overt acts in furtherance of the conspiracy:

> "It is nothing but guesswork to say that the second purchase was contemplated when the first was undertaken or that the two transactions were part of a general plan."

At page 978 the court said:

> "The second scheme was not designed until three weeks after the first had actually ended. The first, if a separate conspiracy, was barred by the three-year statute of limitations when the

indictment was found on November 13, 1930. This is true whether it ended on October 18 or November 11, 1927. Its expiring life could not be revived by the breath of a new and different conspiracy entered into (even if we fix the origin of the first conspiracy as late as October 1) some five or six weeks later.

"Thus we have proof of two conspiracies under an indictment alleging a single one, and a conviction for both when the first was barred by the statute of limitations.

"There was, we are persuaded, a failure of proof of the single conspiracy alleged, *which amounted to a fatal variance.* Tinsley v. United States (C.C.A.) 43 F. (2d) 890; United States v. Wills (C.C.A.) 36 F. (2d) 855; Meyers v. United States (C.C.A.) 36 F. (2d) 859; Wyatt v. United States (C.C.A.) 23 F. (2d) 791; Terry v. United States (C.C.A.) 7 F. (2d) 28."

To the same effect, see:

Beaux Arts Dresses v. United States (C.C.A. 2), 9 Fed. (2d) 531, 533.

Nazzaro v. United States (C.C.A. 10), 56 Fed. (2d) 1026, 1028.

From an analysis of the foregoing cases and many others, which could be cited to the same effect, it is clear that even if the indictment be regarded as pleading the equivalent of a conspiracy, and even if it charged but a single scheme to defraud, proof of the transactions and events occurring after H. D. Sanders appeared upon the scene constitutes a fatal variance.

VII.

INSTEAD OF PROVING THE OFFENSE AS LAID IN THE INDICTMENT, BEYOND A REASONABLE DOUBT, THE EVIDENCE AFFIRMATIVELY DISCLOSED THAT THERE WAS NO COMBINATION IN UNLAWFUL INTENT OR ACTIVITY ON THE PART OF THE DEFENDANTS. (Specification of Error 3.)

The plan of the case as pleaded in the indictment would never be recognized by its evidentiary structure when completed. The very keystone of the charges—the origination of the enterprise and its continuation with a jointly evil intent was denied by the Government's own witness, A. E. Sanders, whom the prosecution vouched for when it placed him on the stand.

While the intent of the parties may be gathered from their acts, nevertheless, when the Government places a man upon the witness stand who gives direct testimony as to intent, as he may when intent is a serious issue, such testimony should be heeded. And, when additional facts testified to by him and other witnesses are clearly consistent with innocent motives, his direct testimony as to the intent and purpose of the parties is, to that degree, strengthened.

In this connection the examination of Mr. Sanders was as follows (354):

> Q. "Mr. Sanders, was there ever a word between you and the Greenbaums, or any of them, that you and they or any of them would commit a fraud upon the public or any member of the public?"
>
> A. "There was not."

Q. "Can you recall any conversation at any time or place between yourself and the Greenbaums, or any of them, where any unlawful act was contemplated?"

A. "There never was as far as I know."

At another point in his testimony he said, in part (349):

"I do remember I said that as far as I was concerned there was no intent on my part, or on the part of anybody that was connected with me, to defraud the public, that I was sold 1000% on the Clarence Saunders Stores. I thought the business was going to be successful, and as far as I knew the Greenbaums thought so too."

It would be hardly fair for the Government to suggest that Sanders be believed as to so much of his testimony as tends to support its position and disregarded as to that which is unfavorable. And it would seem too high a price to pay for his testimony now to urge, contrary to the avowed theory of the indictment, that only appellants, and not he, were motivated by an unlawful intent.

As the result of appellants' efforts between $800,000.00 and $900,000.00 actually went into the treasury of the corporation as fresh capital (349). The chain store plan of business seemed to be demonstrably sound. So far as the commission of 20% paid to appellants is concerned, it was expressly allowed by the Corporation Commission (222, 229, 234, 235). There was nothing inherently wrong with the delivery to appellants by Sanders of shares of his personally owned stock of which he had, also by express permission of the Corporation Commission,

151,000 shares which were not required to be escrowed (241) and the sale of which was not restricted (222). Contrary to the contentions of the District Attorney, these shares were not, immediately upon acquisition by Sanders, transferred to appellants but only upon fulfillment by them of a schedule of performance in the sale of the company shares (405). It was not until six months after the corporation was organized that appellants received any of Sanders stock and then only 3,850 shares were delivered. It was six months thereafter before any additional shares were issued to them (412). This is distinctly at variance with the idea of the preconceived plan, as alleged in the indictment, of organizing and splitting up the shares and selling them for the joint benefit of all the defendants.

Appellants are not, however, charged with violating any securities law nor with conducting an illegal sale of any part of these 151,000 shares. The only allegation of the indictment with respect to the sale of privately owned shares has reference to a 35,000 share block alleged as having been issued to Sanders and sold for the common benefit and profit of the defendants. The evidence revealed that 35,000 shares were issued to Sanders, at his own instance, but were almost immediately cancelled. As Sanders testified, "none of that stock was given to the Greenbaums and they never had anything to do with it whatsoever." (356.)

This court said, in *St. Clair v. United States* (C. C.A. 9), 23 Fed. (2d) 76, 79:

> "The stock of an established corporation, having a ready sale on the market, may be sold at a profit on a small commission, while stock of a

purely speculative character, having no standing on the market, may only be sold through the greatest efforts, and upon a commission that might seem excessive. So an individual or a corporation may by force of circumstances be compelled to pay what might seem an exorbitant rate of interest, or to give what might seem a large bonus in order to raise money in a particular emergency, and yet the agreement to pay the interest or give the bonus may be prompted by honest motives and by sound business judgment. For these reasons, each case must depend on its own facts and circumstances, and the amount of the commission alone cannot be made the sole criterion of fraud."

The company commenced business and made progress but, perhaps, grew too rapidly. The Government's exhibits make a clear chart of the development of the corporation. Within five months from the date of the first permit to sell stock (223) the company had acquired assets, including the Saunders franchise valued at $151,000.00, in the total amount of $454,280.96 (233). Three months after the first permit was issued, Mr. Sanders' lawyer, Mr. Duane Bird, applied for a further permit (229) and advised the Corporation Commission that "the stock issue authorized in said permit No. 6225 has been over-subscribed and the Tucson program has been financed and launched and the company desires now to finance the installation of fifteen stores and a warehouse in Phoenix. Locations for the Phoenix warehouse and stores are now being secured and as soon as you grant the permit for the issuance of the stock necessary to finance the program, the patented fixtures will be ordered from the Clarence Saunders Corporation at Memphis, Tennessee, and the stores

installed and placed in operation in Phoenix as rapidly as possible." (230.) The third application filed by Mr. Bird, dated July 1, 1929 (231), about six months after the first permit was issued, reports, "The company has in operation six stores and a warehouse in Tucson, Arizona, and three stores and a warehouse in Phoenix, Arizona. In addition thereto another store will be opened in Tucson during this month, seven Phoenix locations are under lease and buildings are in the course of construction and should be completed within sixty days, and another location in Mesa has been secured and the store building is now being completed * * *. Barring unforeseen circumstances, nine additional stores will be opened by the corporation by September 1, 1929." (232.)

The financial statement attached to the next permit shows that as of May 31, 1930, the company had acquired assets in the total sum of $1,125,101.14 (236). By the end of December, 1929, the company was in the full swing of its operations, having over $51,000.00 in cash on hand, a quarter of a million dollars in inventories, a large amount of accounts receivable, and fixtures, equipment and automobiles (335). This statement, prepared and approved by Government witness, Brandt, recites a net worth of $884,190.46 and a surplus of $33,780.46.

In a letter signed by the same Government witness, Mr. G. C. Partee, as Secretary of the company, he reported to the stockholders that the company was doing a business of over two million dollars a year and had established, since the first store was opened on June 26, 1929, twenty-four stores (287). Parenthetically, it may be observed that the witnesses for the Government, Partee, Brandt and A. E. Sanders, who, concededly without participation by ap-

pellants, prepared and approved financial statements for submission to the Corporation Commission and to creditors and who made reports to stockholders, were not only not prosecuted or convicted but were used for the purpose of attempting to establish the culpability of appellants.

At the time the company went into receivership, March 19, 1931, at the instance of a stockholder, only $7,609.25 in claims were presented by the creditors. The general accounts payable were less than $19,-000.00, some of which probably became due in thirty days (389). It had $5,600.00 in cash on hand besides the accounts receivable and inventories (389).

During the critical period of the company's existance Sanders, the donee of a suspended sentence, was somewhere in the State of Kansas organizing a new chain of grocery stores, a project with which, it will be conceded, the appellants had no connection whatsoever. In the summer and fall of 1930, according to Brandt (330), and Sanders himself (352), Sanders was absent on the Kansas business. Many other factors combined to weaken the position of the corporation. For example, during the year 1929 Sanders made a single purchase amounting to over $200,000.00 upon which the company took a heavy inventory loss (353).

During the first months Sanders received only a nominal salary but thereafter he drew $1,000.00 a month and later, he said, a minute entry was made for $1500.00 a month, but this amount he did not receive (350). Null, when he testified, said that he didn't remember whether the item of $6,124.74 for life insurance covered the personal life insurance of A. E. Sanders, payable to a personal beneficiary, or

not, and that he considered such a transaction a small one (386, 387), nor could Null state whether the item of expense included the cost of operation of Mr. Sanders' Packard.

The scope of Mr. Sanders' activities and the use to which he personally put the corporation under consideration is revealed in the minutes of the meeting of the board of directors of January 21, 1930, as contained in Government's Exhibit 22 (247). In this meeting at which were preesnt A. E. Sanders, L. E. Sanders and J. M. Nixon (another Government witness) the company was authorized to purchase one-half of the capital stock of Mr. Sanders' Kansas corporation and to guarantee the payment of interest and principal of any debentures issued by the Kansas company up to the amount of one million dollars, the guaranty to be effective only until such time as the Kansas corporation should have acquired assets of over $500,000.00 (247).

When H. D. Sanders came upon the scene with his U-Save Holding Corporation, the control of the company passed into his hands, the books and records were removed from the state (260) and, according to the indictment, over $100,000.00 of merchandise was wrongfully removed from Arizona to California.

In the meantime the ubiquitous Brandt, within a few days after his appointment as Treasurer, had withdrawn $5,000.00 of the corporate funds for, as he testified, Mr. Sanders' Kansas operations (417), but which, as his excluded confession shows, at least to the extent of $2,500.00, was unlawfully embezzled for his own use.

These steps can only spell disaster. It seems to be a harsh commentary upon justice, however, that the

defendant, charged with taking assets out of the state, should not be apprehended, although his address was apparently known (348), that the organizer and head of the enterprise should purchase his liberty by pleading *nolo contendere* and testifying against appellants; that financial statements should be prepared and approved by witnesses for the Government which, if true, demonstrate the truth and not the falsity of the representations charged, while appellants should be convicted largely upon the basis of the testimony of another witness whose peculations and manipulations of company funds, were virtually self-confessed and which could have been proved beyond peradventure of doubt had appellants been given reasonable latitude in their cross-examination.

As has been said, the case when it closed was not the case, in its material aspects, charged by the indictment.

VIII.

THE COURT ERRED IN GIVING TO THE JURY THE INSTRUCTION NOTED IN SPECIFICATION OF ERROR NUMBERED 19.

This instruction which appellants assail upon this appeal is as follows:

> "You are instructed that on the question of the alleged scheme to obtain money or property by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and speci-

> fied in the indictemnt as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven" (460, 522).

Under the evidence adduced by the Government, appellants, as has been said, had no connection with the defendant, H. D. Sanders, or with the U-Save Holding Corporation transactions. It will not be disputed, moreover, that no responsibility can attach to appellants with respect to the many letters, notices to stockholders and reports which had to do with the acquisition of control, the consolidation and the efforts to exchange the stock of the corporation under consideration for that of another company. Seven or eight important exhibits were introduced in the face of testimony to the effect that appellants had nothing to do with these happenings. Mr. A. E. Sanders testified (350) "I don't think the Greenbaums had any connection whatsoever with these last two mentioned companies. (Referring to Piggly Wiggly Holding Corporation and U-Save Holding Corporation.) These companies were organized by my brother, H. D. Sanders."

The Government, nevertheless, succeeded in introducing, over objection, Exhibit 52 (279), a letter signed by K. C. Van Atta, as Vice-President of the company; Exhibit 53 (280), a mimeographed letter to stockholders, dated September 29, 1930, signed by A. E. Sanders; Exhibit 54 (281), a notice to stockholders announcing the advent of H. D. Sanders and his associates and the contemplated consolidation with the U-Save Holding Corporation and other companies; Exhibit 56 (289), another mimeographed letter

to stockholders, dated January 15, 1931, signed by H. D. Sanders, as President, and G. C. Partee, as Secretary, stating, among other things, that the U-Save Holding Corporation had purchased the control of the common stock of the corporation in question; Exhibit 4 (211), certificate of amendment to the articles of incorporation changing the name of "United Clarence Saunders Stores, Inc." to "United Sanders Stores, Inc.," signed by H. D. Sanders; Exhibit 5 (212), articles of incorporation of the Piggly Wiggly Holding Corporation of Yuma; Exhibit 6 (213), the certificate of amendment changing the name of the Piggly Wiggly Holding Corporation to "U-Save Holding Corporation" and Exhibit 8 (214) the articles of incorporation of the Piggly Wiggly Southwestern Company.

Though the jury believed, as they must have believed from the testimony, that appellants had no connection with or responsibility for such exhibits, and no connection with the transactions which such exhibits purported to disclose, nevertheless, if they believed also that H. D. Sander's activities constituted a "substantial practice" and fell within the "lines" of the indictment, then appellants were, *ipso facto*, criminally responsible. The instruction ran counter to the evidence and, in its uncertain breadth, involves appellants in any acts practiced or intended by any other defendant whether or not such events tended to a common end. The fact that the court charged the jury that it was the guilt or innocence of appellants which they had to consider, does not aid the instruction under consideration because the language refers broadly to the "defendants" and is not limited to the defendants "on trial." Moreover, the instruction refers specifically to "practices alluded to and specified in the indictment as fraudulent as to *any*

or all of the defendants," thus including the acts not only of appellants standing trial but also the transactions of the five men who were indicted.

It is impossible to tell, moreover, just what the instruction means. The court speaks of one or more of the "substantial practices." What is a substantial practice alluded to and specified in the indictment? One act could not in the nature of things constitute a "practice." The term necessarily contemplates a series of acts of a similar nature carrying with them the implication of persistence and continuation.

The events charged as being part of the scheme, including the organization of the company, the change in its name, the acquisition of the Saunders franchise and the transfer thereof to the corporation capitalizing it at $151,000.00, and the various steps thereafter, could not be denominated a "practice." Certainly the mailing of one letter which is the gist of the offense would not be a substantial practice. The jury were left to guess what the court had in mind without any attempt at a definition, were definition possible.

Let the court put itself in the place of the jury and it will soon discover the perplexities attendant upon this charge. They, with their lay minds, were required to ponder the indictment read to them at the opening of the trial some four weeks before they retired to consider their virdict, in an inexperienced and unguided effort to determine what fell "within the lines of the charge," as contained in the indictment.

It was the business of the court to interpret the indictment for the jury and not to add to their dif-

ficulties by leaving it to them to test the guilt or innocence of appellants indicted by an instrument couched in legal phraseology under an instruction itself ambiguous and in need of explanation.

So to refer the jury to a pleading, be it civil or criminal in nature, has always been condemned.

In *Baltimore & Ohio R. Co. v. Lockwood*, 72 Ohio State, 586, 590; 74 N. E. 1071, 1072, the court in speaking of the practice of referring to the pleadings and stating the issues to the jury, said:

> "It is the imperative duty of the court to separate these, and to definitely state to the jury those issues which are to be determined by it, accompanied by such instructions in regard to each as the nature of the case may require. A failure to do this necessarily leaves the jury to grope around through the technical and often verbose allegations of the pleadings to find the real points of controversy in the case. When there is but a single issue, which is tersely stated, this might not be prejudicial to the parties; but in almost every case there are intricacies which the jury, from lack of legal knowledge and experience, cannot unravel without the assistance of the court."

See also: *Avra v. Karshner, et al.*, 168 N. E. 237, 238 (Ohio 1929).

Another case, the language of which has a direct application to the case at bar, is *Director General v. Pence's Administratrix* (Va. 1923), 116 S. E. 351, where the court, in speaking of an instruction with reference to the failure to exercise due care "as to any duties charged in the indictment," said at page 357:

"It is 'too indefinite, leaving to the jury to say just what the railroad should have done in the particular case.' This, too, we think is a good objection, and we cannot say that it is cured by any other instructions given in the case. It practically turns the jury loose to find the defendant guilty of any negligence which might be based upon a breach of 'any duties charged in the declaration', which declaration covers 10 pages of the printed record. It is not a simple or easy task to analyze the charges of negligence intended to be set forth in this declaration, and it was not safe to impose that task upon the jury."

In *Laughlin v. Hopkinson*, 292 Ill. 82, the court said at page 84:

"It is urged that the court erred in giving to the jury plaintiff's second and sixth instructions, in which the jury were told, in substance, that if the defendant made the representations alleged in the declaration; that such representations were material; that they were false and that they induced the plaintiff to purchase, then the verdict should be for the plaintiff. The objection is that the jury were left to determine, first, what representations were alleged in the declaration; and second, what representations so alleged were material. The instructions are subject to the criticisms made. What were the material allegations of the declaration was a question of law, and it was error to submit that question to the jury."

In *Lerette v. Director General*, 306 Ill. 348; the court said at page 354:

> "It is contended that the court erred in giving certain instructions at the request of appellee which referred the jury to the declaration to determine the issues. This form of instruction has been repeatedly condemned by this court."

Another instruction, similar in import to the charge under consideration was condemned in *Krieger v. A. E. & C. R. R. Co.* 242 Ill. 544, where the court said at page 548:

> " 'The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff has proved his case *as laid in his declaration*, then you will find the issues for the plaintiff'. * * * * The general rule often declared is, that instructions must in a clear, concise and comprehensive manner inform the jury as to what material facts must be found to recover or to defeat a recovery. The rule adopted by nearly all courts is, that the court must define the issues to the jury without referring them to the pleadings to ascertain what they are. Judge Thompson, in his work on trials, (secs. 1027, 2314, 2582) lays down that rule, and says that it is error to leave the jury to construe and determine the effect of the pleadings, whic hare often drawn in technical language and which might not be correctly understood by persons unlearned in the law."

In *Mulroney Mfg. Co. v. Weeks*, 171 N. W. 36 (Ia. 1919), the court, in speaking of an instruction which referred the jury to the issues embodied in the petition, said at page 37:

> "The appellant complains that the instructions

of the trial court in its statement of the issues embodied the entire petition without discrimination, and that they did not in any manner advise the jury as to what were the material allegations necessary for the plaintiff to prove in order to recover. The instructions are fairly subject to criticism in the respect indicated. The petition was rather prolix in its allegations."

In *Arkansas Fuel Oil Co., v. Connellee,* (Tex. 1931), 39 S. W. (2d) 99, the court said at page 101:

"We will notice but one other assignment. Due exception was taken to the instruction given the jury that 'the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the material allegations in their petition'. Instructions in substance the same, have been held to be error on two or more grounds. It is a general charge, improper to be given in a case submitted upon special issues. It improperly refers the jury to plaintiffs' petition to ascertain the allegations as to which they are directed to determine whether same be supported by a preponderance of the evidence."

In *Gorman v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 28 S. W. (2d) (Mo. 1930), 1023, the court said at page 1025:

"The pleadings are addressed to the court and not the jury. The jury can get no enlightenment as to the particular issues they are called upon to try from hearing the pleadings read. And so we have repeatedly held that an instruction which refers the jury to the pleadings for the issues is erroneous."

In *Mack v. State* (Fla. 1917), 74 So. 522, the court said at page 534:

> "It is the duty of the court to state to the jury the issues made by the pleadings; and, while this duty involves a large discretion as to the form and style in which the instructions shall be given, it is generally held to be erroneous to read the pleadings to the jury *or refer them* to the pleadings for the issues by way of instructing them in the law of the case."

In *Lombard-Hart Loan Co. v. Smiley*, 242 Pac. 212 (Okla. 1925), the court said at page 213:

> "The general rule is as stated by Blashfield, in his work on Instructions to Juries, as follows: In submitting the question of fact it is necessary that the issues involved in the case should be stated to the jury and what issues are raised by the pleading is a question of law which it is the exclusive province of the court to determine.
>
> Where the pleadings are voluminous, as in this case, and so involved as to render it doubtful whether the jury could clearly determine the issues, they should be stated to the jury in the instructions. The issues were not defined in the instructions, and the pleadings were given to the jury for their determination as to what the issues were over the objections of the defendant.
>
> The judgment is reversed, with directions to grant the defendant a new trial."

The Supreme Court of Arizona observes the prevalent rule announced by the authorities, only a few of which have heretofore been called to the court's

attention. In *Hines v. Gale*, 213 Pac. 395 (Ariz. 1923), the court said at page 399:

> "It is, of course, the duty of the court to state to the jury the contentions of the parties, and we can see no impropriety in its reading, for that purpose, the complaint. If, however, acts of negligence are charged in the complaint and no testimony introduced to support them—which is this case—the court should be careful to call the jury's attention thereto so that the jury will be under no misapprehension as to the particular questions they are called upon to decide. For instance, the complaint in this case, among other acts of negligence, charges 'that he (brakeman) was not able to get a signal to the engineer in charge of said engine because said engineer was not watching, and was not paying attention to what he was doing'. There is an entire absence of any evidence upon this charge of negligence, and yet it was read to the jury as one of the issues in the case."

The instruction here under consideration, by its broad reference to the indictment, likewise referred to the jury allegations therein as to which, so far as appellants were concerned, there was an entire absence of supporting evidence.

Because the instruction conveyed to the jury the task of the court in language difficult or impossible even for a lawyer to comprehend and because, moreover, it left the jury to infer culpability on the part of appellants for acts and transactions with which they had no connection, it was clearly and prejudicially erroneous.

IX.

THE COURT ERRED IN GIVING TO THE JURY THE INSTRUCTION NOTED IN SPECIFICATION OF ERROR NUMBERED 20 (467, 523).

The instruction under consideration is as follows:

> "It is common knowledge that nothing is more alluring than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all".

To assume to tell the jury what is "common knowledge" is always, the courts have said, accompanied with dangerous consequences. If a fact or a condition be a matter of common knowledge, there is usually no necessity of calling attention to it, and if it be not, then, of course, the jury are misdirected. The observation that "nothing is more alluring than the expectation of receiving large return on small investments" is not necessarily justified by the experiences of life. To the scientist, his science, to the artist, his product, to the physician, the recovery of his patient, to the lawyer, the welfare of his client, to the court, the assurance of justice, is more alluring than expectation of gain. It could have been only the prosecutor's zeal and his contagious, convicting complex that could have induced him to tender such a gratious instruction. To give it was an outright invasion of the province of the jury. As the court said in *Woodward Iron Co. v. Sheehan* (Ala. 1910), 52 So. 24, 26, "It also assumed to declare common knowl-

edge in respect of a matter of which there could not be, nor was, common knowledge."

The use of the word "alluring" with its implication of a "lure" or "bait," the unjustifiable reference to "lottery schemes," leaving the jury to infer a likeness between the enterprise at bar and gambling transactions which are expressly declared to be illegal, the language with reference to the appeal to the "cupidity of all," could not but be as prejudicial as unwarranted.

Apt illustrations are tolerable and sometimes helpful, but those which are inapt are not only irrelevant but misleading.

As the court said in *Neel, et al vs. Powell,* (Ga. 1908) 61 S. E. 729, 731:

> "Illustrations which are apt and clearly made, and are not so extended as to withdraw the attention of the jury from the issue to be determined, are not generally erroneous, and may sometimes be beneficial. Illustrations which are inapt or irrelevant, or are so made as to confuse or mislead the jury, are to be avoided. Illustrations of the latter class shed darkness upon a case, rather than light."

In its wisdom and experience this court knows that after a long trial the jury wait upon the final words of the court, which are the last words they are to hear, with natural and proper respect and attention. After the prosecutor closed his heated denunciation there fell upon the ears of the jury the words "nothing is more alluring than the expectation of receiving large return on small investments"; and "eagerness to take chances for large gains lies at the foundation

of all lottery schemes"; and "the prospect of receiving more than one has parted with appeals to the cupidity of all." What, it may be asked, were the jury expected to deduce from these words? How could the language be of assistance to them in their deliberations? Exactly what proper function did this instruction fulfill?

Infinite difficulties perplexed the prosecution when the case closed. The defendant-witness whom it called as its own, had contradicted himself. The corporate records showed his activities in his management and treatment of the corporation to be reprehensible. Above all he had affirmatively denied fraudulent intent. The proof of financial condition depended upon summaries based upon books known to be falsified. The income tax cards had been shoved into the record by main force. Without further repetitive enumeration, the Government's case, at best, tilted precariously upon its inadequate foundation. It is at such times when an instruction, indeed an unfortunate phrase or word, may be fraught with inexcusably fatal consequences, and it is then when the court should exercise the most painstaking care and circumspection in his final charge.

CONCLUSION

The time is propitious for some strong court to exert its steadying influence upon the law applicable to mail fraud cases. It has been said, with considerable justification, that trial courts, feeling themselves a part of the machinery of the same Government which prosecutes, have come subconsciously to join forces with district attorneys to bring about the end sought by the prosecuting arm of the nation. There has been a tenuous stretching and straining of legal

principles to uphold indictments returned and judgments rendered until, it seems, each case depends upon the temper and ethical concepts of the court and jury who happen to participate in the trial.

It is neither law nor justice to compel men to stand trial under an indictment as defective as the one at bar, nor is it fitting and proper to sustain a conviction which depends upon unsupported accountants' statements made from records none of which were introduced and not all of which were even present in court, such books as were present not being identified at all for an important period and having for their identification, so far as it went, the testimony of the very man who admitted falsifying them. When to this is added the admission of the income tax memorandum cards, the correctness of which was not vouched for, exhibiting figures copied from original returns which were made by a party unknown and which contained information and computations gathered from, and calculated upon, still other records, the sources not even being described, the case presents a situation not only of leniency extended to a prosecutor but also of downright laxity.

True, the law must ever go forward to meet the developments of social and economic life, but when appellants were subjected to the impact of the Null summaries and the income tax cards without opportunity to test their correctness, the court went back into the centuries when a man was guilty or not, as he failed in, or withstood, primitive, physical tests over which he had no control.

From the studied opinions by this Honorable Court it is confidently believed that it will not approve a judgment of conviction which transposes the burden of proof and the presumption of innocence.

It is humbly prayed that the judgment appealed from be reversed.

Respectfully submitted,

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